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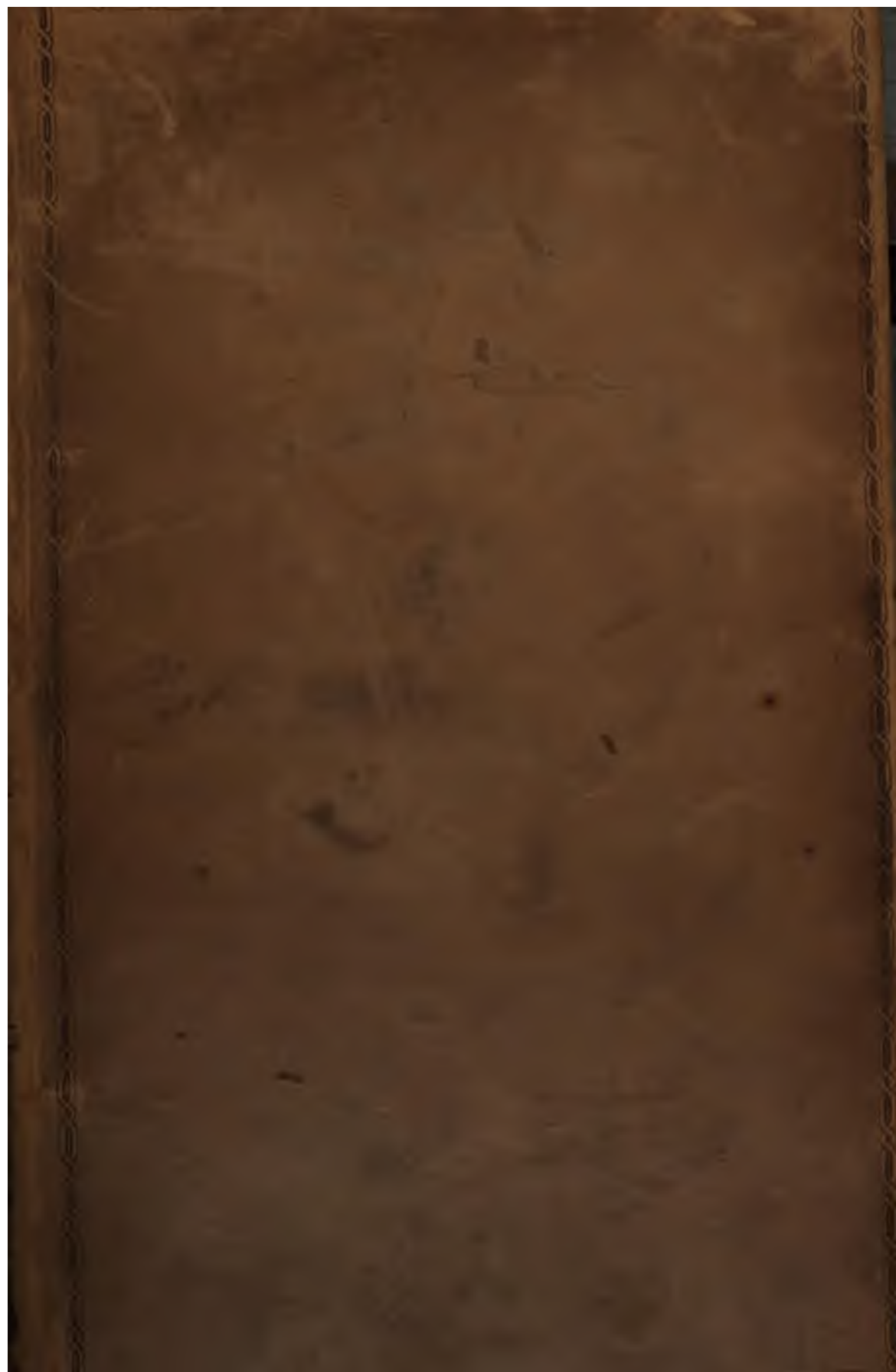
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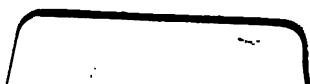
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*From the Author.*

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A N E S S A Y

ON

N E W T R I A L S.

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BY DAVID GRAHAM,  
COUNSELLOR AT LAW.

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NEW-YORK:  
HALSTED & VOORHIES,  
Corner of Cedar and Nassau Streets.

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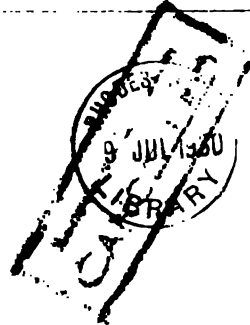
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TO THE  
HON. JOHN SAVAGE,  
CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW-YORK,  
THE FOLLOWING WORK IS,  
MOST RESPECTFULLY,  
INSCRIBED BY  
THE AUTHOR.







## P R E F A C E.

THE principal object of this work is, to aid the junior members of the profession, in a branch of practice of daily occurrence. It was thought that, to supply the place of experience to this most interesting portion of the bar, and prepare them with ready materials for almost every emergency, by collecting, arranging, and exemplifying the rules regulating new trials, an acceptable service would be rendered to the profession.

It is a singular fact, that while other legal topics, of much less interest to the practitioner, are exhausted by elaborate treatises and digests, without end, the subject of new trials, so intimately connected with the progress of the great mass of causes, should have been in a great measure overlooked. The only attempts, devoted professionally to this subject, that have met the author's eye, are, Grant's "Summary," and Morgan's "Essay;" the former, a mere syllabus, intermingling brief discussions with occasional examples, confined to a few rules, and to the leading cases in England; the latter, a mass of precedents without arrangement, set out *in extenso*, as found in the reports.

These works, together with the digests on this title of practice, have been carefully examined, but without reference. The examples, being common property, are taken directly from the reports into this work, after having condensed the narratives, and, in many instances, abbreviated the decisions, that nothing extraneous might appear, to embarrass or confound the illustration.

One great object of the work, throughout, has been simplicity. With this view, such rules, only, as have been

definitely marked with a sufficiently palpable line of discrimination, have been introduced, carefully avoiding subtle distinctions, the bane of all elementary works. For a similar reason, exceptions have not been multiplied, nor any notice taken of obscure decisions, nor of the *dicta*, nor *obiter* opinions of judges, however eminent, nor of their excursive flights of speculation upon ideal cases. However these things might have amused by their novelty, or supplied materials for plausible argument, it was believed they could contribute nothing of real value to the profession.

Following out the idea of simplicity, the plan most likely to accomplish it, appeared to be, to take up the causes for new trials in the natural order in which they arise previous to, upon and after, the first trial; and in order to illustrate each, to state the rule, to adduce leading cases as examples, from the English courts, and courts of highest character in this country, in a condensed form, and to superadd parallel cases, in the same, or in other courts, by way of reference,—not merely to illustrate the rule, but to supply the practitioner with such a profusion of materials, such an imposing mass of authority, as might repel every doubt, and carry conviction into the breasts of the judges.

Although the work has been executed with special reference to the state of New-York, it is hoped it may be found of general utility. The rules it professes to illustrate, the reasons of those rules, and examples adduced, acknowledge no locality. They are not to be circumscribed within territorial limits; but were selected without discrimination or preference as to country. The object was, to collect decisions, combining clear argument with high authority, around every succeeding rule. Where both could not be found uniting, and intelligent opinions have appeared in the reports of courts comparatively obscure, they have not for that reason been overlooked.

It will be perceived that, in some instances, the same cases are introduced more than once. In a great proportion of them, more than one point, and in many instances, several are adjudicated. When re-introduced, they illustrate, in each instance, a distinct principle, and are noticed in relation to that principle alone, referring for the general narrative of the case, to its first introduction.

It may be thought, the author ought to have pledged his own opinions in doubtful cases, or at least have attempted to reconcile apparently conflicting decisions. This has been studiously avoided, from a conviction that little is to be gained to the profession by the opinions of a writer, where the judges disagree; and that he best discharges his duty to the profession, by confining himself to well established rules. It might be gratifying to the writer, it is true, to indulge in metaphysical discussions, upon abstract principles of doubtful operation; but it is an indulgence at the expense of the understanding of his reader, a mere parade of words without power, an arrogant attempt to cut, instead of untwisting, the *nodus judice dignus*. In the presence of the great oracles of the law, giving out their contradictory or ambiguous responses, a writer probably best consults his own reputation, by silence and submission.

The work, it is to be feared, abounds with defects. An original production, comparatively free from blemish, would have required an uninterrupted devotion to the subject, altogether incompatible with the active duties of an arduous profession. This, however, is not the only reason. The subject itself is of unbounded extent. It travels into the undiscovered bourne of judicial discretion, whose extent is as undefinable, as the principles by which it professes to be governed are immutable. As far as judicial decisions, in given cases, have been adjudicated, so far it is reasonably to be expected a work of this kind ought to classify them

under their appropriate rules. Beyond this, it is the *terra incognita* of the profession, where the judge may answer every question as he of Byzantium did the spirited interrogation of the young advocate, "what have the laws ordered in such a case?" "What I please," was the laconic reply.

To aid in guiding and limiting this discretion, is all the ensuing work contemplates, and upon this, its sole pretensions to merit, if it have any, entirely rest. To what extent it ought to be appreciated, will appear by reflecting that whatever, in the administration of justice, is surrendered to judicial discretion, is conceded to be without law. And what is the substitute? Let Lord Camden answer. "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."

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**NEW TRIALS.**



# NEW TRIALS.

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## INTRODUCTION.

A TRIAL is the examination of an issue in fact, and taken in its largest acceptation at common law, embraces an examination of the facts by the record, by attain, by certificate, by witnesses, by wager of battel, by wager of law, and by jury.(1) A new trial is a re-examination of the issue, and has not only reference, as the terms import, to a previous trial, but to the last of the above enumerated kinds, that by jury; for it is believed few instances, if any, can be adduced of a re-examination of the issue directed by any other mode of trial. The superiority of the trial by jury recommends itself so forcibly to every reflecting mind, as to preclude all argument. Although derived from a barbarous age, it has been, and continues to be, the boast of modern nations, most distinguished for intelligence and refinement. It is a subject of such universal interest, as not only to be incorporated with the jurisprudence of most of the nations of Europe, and of these United States, but to be defined with unusual precision, and guarded by every precaution that the collected wisdom of ages, embodied in legislative enactments, can provide for its durability and perfection.

Trials by jury in civil cases at common law, are of two kinds, *extraordinary* and *ordinary*. To the former be-

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(1) 3 Blacks. Com. 330.

long the inquest of the *grand assize*, and of attain, the latter of which, in England,(1) and both of which, in the state of New-York, have been abolished; so that with us, the ordinary trial by jury, that by referees, being so nearly allied to it, as to require no separate consideration, alone remains.(2)

When, in what court in particular, and for what causes new trials originated, are subjects involved in impenetrable obscurity by the lapse of ages. It would appear, that as early as 1351, a *venire de novo* was directed for the misbehaviour of the jury. A second instance is found in the year books about 1410, occasioned by the misconduct of the prevailing party in tampering with the jury.(3) During a period of about 250 years that succeeded, scarcely a vestige of the practice of the court respecting new trials remains. Lord Hardwicke, in the *Queen v. Bewdley*,(4) in accounting for this silence, says, "One reason why we do not find this practice more ancient may be, that there are no old reports of motions." Be that as it may, it is certain, that down to 1598, whatever was alleged as cause for a new trial, must have appeared of record.(5) The first inroad upon this practice was made by the common pleas, upon certificate of the judge that the verdict passed against his opinion, as appears from Slade's case,(6) in which *Bacon, J.*, stated, that judgment had been arrested in the common pleas on such certificates. And *Rolle, J.*, held, the judgment ought not to be stayed, though it had been done in the common pleas. Up to Slade's case in 1648, it would appear that in the king's bench no attempt had ever been made to stay a judgment, or direct a *venire de novo*, except for matter of record, and consequently, until then, new trials upon erroneous verdicts, or for any

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(1) 6 Geo. IV. 3 Chitty's Blacks. 357, *in notis*.

(2) 2 R. S. 409, 410.

(3) 3 Blacks. Com. 388.

(4) 1 P. Wms. 213.

(5) Cro. Eliz. 616.

(6) Style, 138.

other cause than gross misbehaviour of jurors, or of the parties, was a thing unknown.(1) It is conceded, that the first cause in which a new trial is reported to have been granted on the merits is, *Wood v. Gunston* in 1655, after a trial at bar, in a case of slander, and on the ground of excessive damages.(2) All the subsequent decisions, where the judges have taken occasion to refer to the origin of new trials for erroneous verdicts, point to this case.(3) Shortly before this, in the case of *Slade, Rolle, J.*, had observed, that though it had been done in the common pleas, it was too arbitrary for them (in K. B.) to do it. And he adds, "you may have your attain against the jury, and there is no other remedy in law for you; but it were good to advise the party to suffer a new trial for better satisfaction."

But a precedent having once been established, the rigid practice of the court suddenly gave way. That relief which had been hitherto regarded as unreasonable to ask, and too arbitrary to grant, became a favourite with the judges, and a system of judicial decision gradually followed, built up upon liberal and enlightened principles, greatly tending to the advancement of justice.(4)

Prior to this, the party suffering injustice by a verdict, might resort to his writ of attain, founded upon an allegation of perjury in the jury, having found against law or evidence—a remedy given against the recognitors of assize alone in the first instance, but extended subsequently by various enactments to other inquests. It consisted in trying the jury who rendered the alleged erroneous verdict, by another jury of double their number, whose verdict, if it falsified the former, was followed by infamy, fine, imprisonment,

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(1) 3 Blacks. Com. 388. 2 Str. 985. 11 Mod. 119.

(2) Style, 466.

(3) Vide 10 Mod. 202. 2 Salk. 648. 1 Str. 392. 1 Burr. 394.

(4) 2 Term. Rep. 113.



forfeiture of goods, with other severe penalties, affording at the best, a barbarous and ineffectual remedy.<sup>(1)</sup> In cases not provided for by attain, the complainant was compelled to resort to equity, where a new trial was directed, under the penalty of a perpetual injunction if the adverse party should refuse; an expensive, cumbrous, and awkward expedient. But when the courts of law began to interfere, and the practice of new trials acquired consistence and facility, the writ of attain fell instantly into disuse, and courts of equity became gradually less frequented. What bestowed additional value upon this amelioration of the practice was, the multiplicity and intricacy of causes, originating in the extension of commerce, and its necessary consequences, luxury and refinement.

It is evident then, that new trials originated, not in any overweening anxiety of the courts to monopolize power, or extend a jurisdiction to which they had no claim. On the contrary, they resisted the change, until they were driven from their position by the accumulated force of public opinion, relative to an evil for which neither the law nor practice of the courts had provided any remedy. Under the changed aspect of society, had the trial by jury continued, without a competent power to correct its erroneous results, it must have proved a source of intolerable mischief. To use the language of Lord Mansfield, in *Bright v. Eynon*, "Trials by jury in civil causes could not subsist now, without power somewhere to grant new trials. If an erroneous judgment be given in point of law, there are many ways to review and set it right. Where a court judges of fact upon depositions in writing, their sentence or decree may, in many ways, be reviewed and set right. But a general verdict can only be set right by a new trial, which is no more than having the cause more deliberately considered by another jury: when there is a reasonable doubt,

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(1) 3 Blacks. Com. 402.

or perhaps a certainty, that justice has not been done. The writ of attain is now a mere sound in every case ; in many it does not pretend to be a remedy.(1) There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate, the examination may be so long as to distract and confound their attention. Most general verdicts include legal consequences as well as propositions of fact : in drawing these consequences the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.”(2)

Of the acquisitions to justice occasioned by an impartial and enlightened use of the power of granting new trials, there can be no doubt. Its utility is not to be measured by necessity alone, but by its beneficial results, contrasted with the evils, which, but for this, the system of trial by jury must have entailed. To borrow the classical language of Sir William Blackstone, “If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing, which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be

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(1) Since abolished ; *supra* p. 2.

(2) 1 Burr. 394.

tried by a jury, merely upon the general issue, where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other, and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surprised by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law, and misdirect the jury; he may not be able so to state and arrange the evidence, as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion *instanter*, that is, before they separate, eat or drink; and, under these circumstances, the most intelligent and best intentioned men may bring in a verdict, which they themselves, upon cool deliberation, would wish to reverse. Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied, unless he had a prospect of reviewing it. Such doubts would, with him, be decisive. He would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress."<sup>(1)</sup>

It followed, as a necessary consequence, that the causes of new trials were no longer confined to the record. As the modern practice called into exercise a power of courts of law that formerly lay dormant, it proceeds upon new grounds, being matters *dehors* the record:—a circumstance tending strongly to discriminate between a *venire de novo*, awarded upon reversing a judgment for error on the re-

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(1) 3 Blacks. Com. 390.

cord, and a new trial, founded on incidents developed in the course of what is technically called a trial, beginning with the summoning of the jury, and ending with their verdict. The former comprises writs of error with the subsequent proceedings, is confined to the record, and contemplates an avoidance of the judgments. The latter consists of mere motions, on circumstances out of the record, and having for its object to set aside the verdict. The writ of error is the strict right of the party relying on the law, and appealing to the legal convictions of the court; but motions to avoid verdicts, take a wider range, and are, for the most part, addressed to the discretion of the judges, upon the equity and conscience of the case.

The action of the courts upon applications for new trials, consists in a proper exercise of discretion, not arbitrary but legal, forming and moulding their decisions in each case according to some precedent, or upon its own particular circumstances, so as best to subserve the purposes of substantial justice. This is the distinguishing characteristic of this head of practice, in which it evidently approaches the province of equity, acting upon a rule of universal application, neither to grant nor refuse a new trial against the conscience of the case. This salutary principle runs through all the cases, and every rule will be found either more intimately or remotely connected with it, and controlled by it. While the courts exercise the utmost caution, lest they interfere with the province of the jury, they avow their readiness to interpose, when the justice of the case demands it. This is clearly put in the leading case, *Wood v. Gunston*, by *Glynn*, Ch. J.: "It is in the discretion of the court, in some cases, to grant a new trial, but this must be a judicial and not an arbitrary discretion." In granting new trials, say all the justices in *Allen v. Peshall*, "regard is to be had to the true merits of the case."<sup>(1)</sup> "An application for a new trial," says

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(1) 2 Blacks. 1177.

*Ashhurst*, J., in *Edmonson v. Machell*, "is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice."<sup>(1)</sup> And *Buller*, J., in *Estwick v. Caillaud*,<sup>(2)</sup> "On an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case, for though the judge may have made some little slip in his directions to the jury, yet if justice be done by the verdict, the court ought not to interfere and set it aside." Again in *Wilkinson v. Payne*,<sup>(3)</sup> *Buller*, J., "If the verdict be consistent with the justice, conscience and equity of the case, we ought not to grant a new trial." And speaking of the case of the *Duchess of Mazarine*, he says, "There can be no doubt but that was the case of a verdict against law, yet the court said, as the justice and conscience of the case were clearly with the verdict, they would not interfere." And in *Cox v. Kitchen*,<sup>(4)</sup> where the learned judge held this language, he adds, "The defence is dishonest and unconscientious, and on that ground I think the court ought not to interpose." And per *Gibbs*, J., in *Hutchinson v. Piper*, "a motion for a new trial is not a matter of right."<sup>(5)</sup> Once more, per *Nares*, J., in *Rafael v. Verelst*, "Every thing that can be done, should be done, to remedy an injury received, and for that purpose *boni judicis est ampliari jurisdictionem suam*."<sup>(6)</sup> It is to be remarked in this case, Chief Justice *De Grey* uses this observation—"In exercising the jurisdiction of granting new trials, the court is not arbitrary, nor has any discretionary power." To make this consistent with the uniform declarations of the judges, the chief justice must be understood as using the term discretionary as equivalent to arbitrary, and intending to recommend the exercise of a sound judicial dis-

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(1) 2 Term Rep. 4.

(2) 5 Ibid. 425.

(3) 4 Ibid. 470.

(4) 1 Bos. & Pul. 339.

(5) 4 Taunt. 555.

(6) 2 Blacks. 987.

cretion. Indeed, it is impossible to resist the conviction, upon a close examination of the cases, that in deciding upon motions for new trials, courts of law are compelled to assume a power approximating to that of equity jurisdiction, and not unfrequently to put themselves in the place of the legislator, the more effectually to defeat injustice. To not a few instances of this exercise of discretion, the observations of the profoundest philosopher of antiquity will apply: "It is equity supplying the defects of strict legal justice, and deciding as the legislator himself would have done, had the whole subject been in his contemplation; for many particulars escape the notice of the legislator, and occasion the enactment of unjust laws, much against his will: even with his will and consent, laws good in general are enacted, but which, because they are general, may be found unjust in particular cases; and it is altogether impossible to comprehend all that indefinite variety of circumstances and conditions which, in each particular application, would render law conformable to the dictates of substantial justice."(1)

But notwithstanding the difficulty of reducing the exercise of discretion to rules, and the utter impossibility of doing it in every case, this department of the practice is not deficient in this respect. Strongly marked cases have sprung up in succession, admitting the application of some well-defined principle, and furnishing a precedent for all cases reducible to that class; and in branches of practice, attempts have been made to classify the cases, and present each class with its appropriate rules and illustrations.

In conclusion, whatever tends to detract from the true merits of a case, or to impair the rights of a party, so far tends to promote injustice. To correct this injurious re-

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(1) Arist. Rhet. by Gillies, pp. 235, 236.

sult is the object of new trials. The causes contributing to it occur at every stage of the proceedings, and in every instance the wrong complained of, properly presented to the court, will receive attention, and, if well founded, obtain relief. The injurious verdict will be set aside, for want of notice of trial—irregularity in impanelling the jury—misconduct of the prevailing party—misbehaviour of the jury—a void verdict—absence, surprise, and mistake of parties—absence, surprise, and infamy of witnesses—improper admission and rejection of testimony—misdirection of the jury—verdicts against law—against evidence—excessive or reduced damages—newly discovered evidence—for erroneous verdicts in hard actions—after two trials—and in feigned issues. In all these cases new trials will be granted or refused, in accordance with the dictates of justice.

To illustrate the principles governing the courts in their decisions on applications of this kind, is the object of the following work. That this may be accomplished with greater perspicuity, the various causes of new trials will occupy each a distinct chapter, and be taken up in the order above-mentioned.

# OF NEW TRIALS.

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## CHAPTER I.

### WANT OF DUE NOTICE OF TRIAL.

It is a principle pervading our free institutions, that no one is to be condemned unheard. Wherever justice is fully and impartially administered, it must be a fundamental rule, that the party impleaded shall have due notice of when, and where, and against what, he is to defend himself. What constitutes a sufficient notice, depends upon the rules of the different courts, which are in some degree arbitrary, but when once adopted, become the law of the court.(1)

1. Justice requires, if there be no notice, or if it be insufficient, there having been in truth no trial, that the verdict be set aside, unless the defendant have appeared and made his defence, which will be construed into a waiver.

Want of due notice, therefore, has been held to be a proper ground for a motion for a new trial ; but the defendant is precluded if he appear at the assizes and make defence.(2) So ruled in *Thermolin v. Cole*.(3) In *Rex v. Bear*, upon an indictment for a libel, the defendant was acquitted, and upon motion for a new trial, it was held

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(1) Vide as to notice, 1 Chitty's Arch. 223—226. Gra. Prac. 225, 226.

(2) Bull. N. P. 327.

(3) 2 Salk. 646.



that in cases of that description new trials were never allowed, unless the defendant's acquittal were procured by fraud or mal-practice. "In indictments of perjury," say the court, "we never do it, because the verdict is against evidence ; but if you prove a trick, as no notice, &c., it is otherwise."(1)

The effect of this irregularity is illustrated in a late case in the exchequer ; *The Attorney-General v. Stevens and Prall*.(2) The defendant's counsel had obtained a rule, calling on the attorney-general to show cause why the verdict should not be set aside, and a new trial granted under these circumstances. The affidavit of *Prall* stated that the defendants were in partnership in the trade of wine merchants : that *Stevens* was very old and infirm, and left the entire management of the business to *Prall*, and that a joint information was filed against them, on a charge of mixing Cape with other wine, and for smuggling brandy : that they were both served with *subpœnas*, to which they appeared and pleaded, each by a different solicitor, and clerk in court : that he had instructed his attorney to prepare his defence : that the information had been tried, and the crown had recovered a verdict for £400 for the said offence, although neither the deponent, nor his said attorney, had received notice of trial : that he was prepared for his defence, and that *Stevens*, relying on him, had taken no steps in the cause : that he had never heard from any one that notice of trial of the information had been given to *Stevens*, and that for want of notice being given to deponent, no steps were taken for his defence, or for that of *Stevens*. *Prall's* attorney deposed, that after having procured a copy of the information, he never had notice of any further proceedings being had in the cause, till the day before the trial, when he heard from the agent

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(1) 2 Salk, 646.

(2) 3 Price, 72.

of the attorney of *Stevens*, that the cause was to be tried the next day. That neither he, nor his clerk in court, had received notice of trial: and that he had never any communication with *Stevens* on the subject of the information, or with his attorney or agent, till the day before the trial: and that if he had received due notice of trial, he should have been prepared for the defence of *Prall*, which would have been also the defence of *Stevens*, who, he believed, had a good defence. The attorney for *Stevens* deposed, that he was employed to appear and plead for his client only, but that having understood that *Prall's* solicitor was preparing for his defence, which would also be that of the defendant *Stevens*, he therefore deemed it unnecessary to take any further steps on his behalf: and that when notice of trial was received by his agent, as attorney of *Stevens*, he was not aware that the defendant *Prall* had had no notice. The agent of *Prall's* attorney swore, that he had directed his clerk in court to appear for *Prall*, which had been done: and that a separate plea was afterwards put on the roll on the part of *Prall*: and that neither he, nor his clerk in court, had received notice of trial in the cause. It was urged against the motion, that inasmuch as the defendants were partners in trade, and the offence charged affected them both jointly, notice to the clerk in court of either, should be deemed good notice to both. To this it was answered, that *Stevens* had a right to his several defence, that he might have a remedy over against *Prall*, if it turned out that he had by his misconduct led him into the difficulty. The court decided, that, under these circumstances, each defendant was entitled to a separate notice of trial, and *Prall* not having been served, they made the rule absolute as to both defendants.

It has likewise been held, that on a new trial ordered, a fresh notice of trial is necessary; otherwise a second new trial will be directed. *Bingley v. Mollison*.<sup>(1)</sup> "New

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(1) 3 Doug. 402.

trial from the northern circuit. The point determined was, that on a new trial a fresh notice of trial is necessary. For want of such notice in this case a new trial was granted." So where a defendant had entered a cause in the marshal's book, with a mark of *ne recipiatur* ; and the plaintiff brought the case on to trial on such entry, without notice as an undefended cause, and obtained a verdict, the court set aside the verdict for irregularity.(1)

2. So where there are two or more actions depending between the same parties, should the notice of trial be for one case only, and the defendant thereby disconcerted in preparing his defence, and the plaintiff take a verdict, a new trial will be granted.

One *Lisher* had commenced two suits against each of the defendants, *Parmelee*, *Mygatt*, and *Stebbins*,(2) one for slander as a clergyman, the other as a merchant. A notice of trial was served in the three causes, one against each defendant, nine days before the circuit. The defendants' attorney applied to the plaintiff's counsel, who resided near, to know which three causes were intended to be tried, who answered he was not informed ; but two days after acquainted him the plaintiff would try the suits in which he had declared for slander of him as a clergyman, if he could obtain his witnesses, otherwise he would try the other suits. The defendants' counsel had procured a stay, with notice of motion to set aside the notice as vague, which, after the circuit, he countermanded, and the plaintiff's attorney gave notice of motion for costs, for preparing his causes for trial, and of the motion. The court denied the plaintiff's motion with costs, and in remarking upon the notice say : " Under the peculiar circumstances of these cases, the notices of trial were insufficient, as not

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(1) *Watson v. Gowar*, 8 Dow. & Ryl. 456.

(2) *Lisher v Parmelee*, 1 Wend. 22.

apprizing the defendants of the causes intended to be tried. The plaintiff had held the defendants to the strictest practice, by giving notice at the latest possible moment, and he should have seen that the notice thus given was perfect as to the end for which notice is given."

3. But upon a motion for a new trial, on account of the insufficiency of the notice, the court will inquire whether the defendant could reasonably be misled, and will grant or refuse the motion in their discretion.

Thus in *Batten v. Harrison*, a rule nisi had been obtained, calling upon the plaintiff to show cause why a writ of inquiry executed in this cause should not be set aside for irregularity. The irregularity complained of was for "Tuesday, the 14th day of January instant," whereas the 14th of January fell on a Thursday, and on which day the writ of inquiry was in fact executed. It appeared, that on the morning of Thursday, the 14th, the plaintiff's attorney met the defendant, who told him that his notice was irregular, and he should not attend the inquiry, but did not point out to the attorney what the irregularity was. In showing cause, the counsel cited *Doe v. Kightly*,<sup>(1)</sup> where the court of king's bench held a notice to quit at "Lady-day, which will be in the year 1795," the same being delivered at Michaelmas, 1795, to be sufficient to support an ejectment, the year 1795 being rejected as impossible. Lord *Alvanley*, Ch. J.—"It is clear that the defendant was not misled by this error in the notice, but that, relying on the irregularity, he neglected to attend the execution of this writ of inquiry. But though Tuesday was, by a clerical mistake, introduced instead of Thursday, yet the notice being for 'Tuesday, the 14th of January instant,' a given day does seem to be thereby pointed out.

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(1) 7 Term. Rep. 59.

The case of the notice to quit, appears to me a very strong authority in favour of our rejection of the word "Tuesday," and thus making it a regular notice of a writ of inquiry to be executed on the 14th of January. Therefore, as the defendant is not stated to have sustained any injury by his non-attendance, at the execution of the writ of inquiry, I think it ought not to be set aside."(1)

So in *Wolfe v. Horton*.(2) On certiorari to the mayor's court, after issue joined, the plaintiff, without declaring *de novo*, served a notice of trial for Tuesday, the 18th of April, and took an inquest. The defendant moved to set aside the inquest, and urged, among other things, that the notice of trial being for *Tuesday* instead of *Monday*, the 18th, was insufficient, and therefore, on this ground, as well as the others, the application ought to be granted. *Per Curiam*—"The last objection is a captious attempt to take advantage. The period at which the sittings were held was a matter of general notoriety. The day of the month was right; and though that of the week was wrong, it could not, as the plaintiff's counsel have remarked, mislead, and must, therefore, be rejected as surplussage, for it was not necessary to state it."

In *Bander v. Covill*.(3) the plaintiff's attorney noticed this cause for trial and inquest by a notice dated November 3, 1824, that it would be tried at the next circuit court to be held in and for the county of *Rensselaer*, at, &c., on the third Monday of November instant, whereas the circuit was appointed for, and commenced on the next day, the third Tuesday of that month; but it appeared, by various conversations between the counsel of the parties, which took place in the course of the circuit, that the defendant's counsel or attorney was not misled by the mistake. The plaintiff's counsel took an inquest by default, which the defend-

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(1) 3 Bos. & Pul. 1.      (2) 3 Caines, 86.      (3) 4 Cowen, 60.

ant moved to set aside, for the defect in the notice. *Sed per Cur.*—"In determining the sufficiency of this and the like notices, it is a general rule, that we will inquire whether the attorney or party was misled by the defect. Now though these circuits are not appointed by law, yet notice is required to be published, and the attorneys, especially where, as here, they live directly in the neighbourhood of the circuit, must look to it. But we will also examine the question whether the party, his attorney, or counsel, have, in fact, been misled: and it appears clearly, in this case, that they have not. The motion must be denied."

4. Should injustice be done, however, by retaining the verdict, the inquest will be set aside, and a new trial granted.

As in *Yate v. Swaine*.<sup>(1)</sup> A rule was obtained to show cause why the writ of inquiry of damages and inquisition thereon should not be set aside. Two objections were made; one that the notice was served upon the defendant himself, and not his attorney; and the other, that the time appointed by the notice for executing the writs of inquiry was between the hours of ten and five. It was admitted for plaintiff that both objections were good; but it was insisted that both of them were cured, by one Russel, an attorney's clerk attending at the execution of the writs of inquiry on the part of the defendant, cross examining plaintiff's witnesses, and producing a witness for defendant. The damages were £250. No special damages being laid, and it appearing that plaintiff was confined for no longer time than twenty-six days, and plaintiff himself making no affidavit about the damages or imprisonment, the court thought the damages excessive, and ordered the inquiry to be set aside upon payment of costs, and a new

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(1) Barnes, 233.

writ of inquiry to be executed' before a judge at next assizes.

So in *Love v. Jarret*.<sup>(1)</sup> Defendant had time to plead by a judge's order rejoining *gratis*. Plaintiff delivered a paper book containing a bad replication, and an issue joined by defendant. Defendant's agent's clerk received and paid for the paper book : but his master perceiving the replication to be bad, returned the book to plaintiff's agent, and gave notice of the mistake, notwithstanding which, plaintiff went on to trial and had a verdict without defence, and rule absolute to set aside the verdict without costs.

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(1) Barnes, 457.

## CHAPTER II.

### FOR IRREGULARITY IN EMPANNELLING THE JURY.

By the laws of this state, it is provided that "No member of this state can be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."<sup>(1)</sup> These peers consist of twelve good and lawful men (*probi et legales homines*) possessing such qualifications, and convened and empannelled by such formalities as the law prescribes.<sup>(2)</sup> It is a provision derived from Magna Charta, and introduced into the several constitutions of the different states and of the United States.<sup>(3)</sup> If, therefore, these forms be disregarded, and the case tried by incompetent persons, irregularly summoned and empannelled, or one man personate another, the verdict will or will not be set aside, according as the party complaining may or may not have sustained injury by the irregular proceeding.<sup>(4)</sup>

The former practice was strict in this respect. The competency of jurymen was rigidly scanned, and even inquests set aside for what would now be disregarded as slight irregularities unless actual injury ensued.

1. The verdict has been set aside where some of the jurors have been notoriously deficient in property, or the personal qualifications required by law, or when personated by others.

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(1) 1 R. S. 93. § 7.

(2) Vide 2 R. S. 413, 414, and Gra. Prac. 245.

(3) Vide 3 Peters, 446.

(4) As to the qualifications of jurors, see 2 R. S. 411, § 13.



In *Stainton v. Beadle*, a rule had been obtained to show cause why the inquisition should not be set aside on the ground that the writ of inquiry had been executed at the time of the assizes before jurymen, some of whom were debtors taken out of prison for the purpose. This was opposed on the ground that the defendant's attorney had attended the execution of the writ; but, per Lord *Kenyon*, Ch. J.—“My doubt at first was whether the defendant had not waived taking advantage of this objection by appearing before the sheriff: but for the precedents sake, we ought to set aside this inquisition.” His lordship also hinted that, if the sheriff had been made a party to the rule, perhaps the court would have made him pay the costs of the application.(1)

So when a juror, although regularly summoned and returned, personated another.

In *Norman v. Beaumont*,(2) *Richard Geater*, summoned and returned as a juror, did not attend the assizes; but one *Richard Sheppard*, who was verbally summoned to serve as a juror on the crown side, did attend: when *Richard Geater* was called, *Richard Sheppard* (thinking himself called) answered and was sworn as a juror. Defendant insisted, that the verdict was null and void, the trial not having been by twelve but by eleven jurors only. Neither party knew any thing of the mistake till after the trial. It was urged for plaintiff that defendant ought to have challenged *Sheppard*; that after recording the verdict no averment can be admitted against the record; that *Sheppard's* place of abode was different from that of *Geater*, which would have been good matter of challenge, and if defendant could aver against the record, yet the defect is cured by the statute. The verdict was for plaintiff, damages one shilling; and Lord Ch. Justice *Lee*, who tried the cause, had certified

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(1) 4 Term Rep. 473. (2) Willes, 484. S. C. Barnes, 453,

to entitle plaintiff to costs. *Per Cur.*—By the statute 3 Geo. II., all the twelve jurors ought to be drawn out of the box,<sup>(1)</sup> and the name of *Richard Sheppard* was never put into the box. The court are not bound by the record. Here has been no trial, nor is the defect cured by the statute. The rule to show cause why the verdict should not be set aside was made absolute.

So, in *Russell v. Ball*,<sup>(2)</sup> defendant paid twenty-five pounds into court on the common rule; plaintiff refused to accept the money, proceeded to trial, and on a full hearing of the merits, had a verdict for £25, the exact sum paid into court, (in consequence whereof plaintiff not having recovered more, was, by the rule, liable to pay costs to defendant.) To avoid which, plaintiff moved to set aside the verdict, objecting, that the cause was tried by eleven jurors only. It appeared that one *John Pearce*, summoned on the jury, did not appear, but his son of the same name, not qualified, attended the assizes, and when the father was drawn, and called, answered for him, and was sworn on the jury. *Per Cur.*—"The verdict by eleven jurors only is no verdict: it is null and void."

And the same rule has been held to apply where the juror is destitute of the necessary personal qualifications.

The wisdom of the law declaring that a juror be *omni exceptione major*, contrasted with the evil consequences that might result from a too rigid adherence to the rule, was strongly tested in a recent case, the *King v. Tremaine*.<sup>(3)</sup> A new trial was ordered, it appearing that a juror regularly summoned had been personated by mistake under the following circumstances. A special jury had been directed, but all the special jurymen summoned not being in attendance, a *tales* was prayed on the part of

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(1) Accord. 2 R. S. 420. § 60, 61.

(2) Barnes, 455.

(3) 7 Dow. & Ryl. 684.

the crown. In the *tales* panel annexed to the record was the name of "John Williams," and that name being called by the associate, a person who answered thereto went into the box, and being sworn of the jury, joined with the rest in returning the verdict. After the trial was concluded, it was discovered that the name of the person who thus answered was Richard Henry Williams, the son of John Williams: that he was an infant under the age of twenty-one, being only of the age of twenty years and six months: that he had not been summoned on the jury, and that he was not qualified in respect of property to serve, being possessed of no freehold or copyhold estate whatever. It appeared from the affidavit of the young man himself, that his father had been summoned to attend as a jurymen at the assizes: but that being unable, from illness, to appear, he had requested the deponent to attend for him: that he attended accordingly: and that upon hearing the name of John Williams called he answered thereto, and went into the box, and took the jurymen's oath, not knowing that there was any harm in so doing. All collusion between the deponent and defendant was denied.

Against the motion, it was urged, that the objection ought to have been taken at the trial, and the juror challenged, and the great injury that must result to the administration of justice, should the objection be entertained; and *Hill v. Yates*,<sup>(1)</sup> and "The Case of a Jurymen,"<sup>(2)</sup> which will be noticed hereafter, were cited. The judges delivered their opinions *seriatim*, two of which are selected as illustrative of the rule.

*Abbott*, Ch. J. "I am of opinion that there ought to be a new trial. I do not see how a challenge, properly so called, could have been taken to this person, he not having been summoned as a juror. If he had been returned on

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(1) 12 East, 229.

(2) Ibid. *in notis*,

the panel, then a challenge would have been the proper mode of objecting to him. No person on either side of this case appears to have been aware that this young man, who had thus intruded himself into the box was not the party really returned upon the jury. The cause being to be tried by a special jury, the *tales*, if prayed, would be to be taken from some other list, and a *tales* being prayed, this person is supposed to be taken from that other panel. I am aware of the difficulty mentioned by Lord Ellenborough, in *Hill v. Yates*, that this objection would afford an opportunity for practice; that by underhand contrivances, a party might get a person who is disqualified to answer for another, and to serve on the jury, reserving to himself the power of bringing the objection forward, if the objection should be against him. There is that difficulty certainly, and it is necessary to guard, as well as we can, against such practices: but I do not know that we should be justified, merely from the apprehension of mischief that may arise in some cases hereafter, by reason of illegal practices of that kind, in going the length (which we must do if we refuse this rule) of saying, without any practice on either side, that a verdict pronounced by a jury, on which a person incompetent, both by reason of nonage and want of qualification, has served, ought to stand, particularly in a case so highly penal. I think we must not suffer ourselves to be influenced on the present occasion by an apprehension of ill consequences that may arise in other cases hereafter. Indeed, it is not very likely that such practices can be of frequent occurrence, or that many persons would be likely to interpose and serve on a jury to whom such an objection as this would arise. Considering the way in which this objection has occurred, and that we are not restrained by any technical rule of law, I think we are bound to look to the facts of this particular case, and say that the only mode of correcting this error, is to make the

rule absolute for a new trial. It is quite clear that it cannot be corrected in any other way."

*Holroyd, J.*—"It appears to me, that in this case we could not pronounce a judgment upon the verdict against the defendant. The affidavits acquit the defendant of all fault in the transaction, and discharge him of any privity to this young man's serving on the jury. The verdict has been found by eleven competent jurymen only. The twelfth is by law incompetent, he not having attained the age at which the law considers him of capacity to judge on matters of this kind: and that being so, we ought not to pass judgment upon a verdict so found, particularly in so serious a crime as perjury. To support a judgment, it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mis-trial."

So, in *Drumgould v. Horne*, where a special jury was directed, and the whole panel neglected to attend, and the cause was tried by talesmen, a new trial was granted upon the ground that the cause had been tried by a jury altogether different from that which the law provided. "Such a proceeding, if sanctioned," say the court, "would directly defeat the object contemplated in cases of importance and intricacy, by securing to the party a more complete jury." (1)

2. But if the juror be qualified in other respects, the verdict will not be set aside upon the ground of his personating another through misapprehension, when no injustice has been done.

The case of *Hill v. Yates*, (2) the weight of which was so much felt in the last cited case, was this: the plaintiff had obtained a verdict which the defendant moved to set

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(1) 1 Hud. & Brooke, 412.

(2) 12 East, 229.

aside, because the son of one of the jurymen returned upon the panel, had answered to his father's name when called, and had served upon the jury; which fact was now verified by the affidavits of the son, and of the defendant's attorney, and also of the sheriff's officer who summoned the jury, and who swore to having summoned the father and not the son, and he referred to the case of *Norman v. Beaumont*.<sup>(1)</sup> The court, however, considering the extreme mischief which might result to the public from setting aside a verdict upon a motion for a new trial on such ground, inasmuch as the same objection might happen to lie against every verdict on the civil and criminal sides at the assizes, refused to entertain the motion; but said, that if, upon consideration and consultation with the other judges, they found themselves bound to grant it, they would of their own accord award the rule prayed for. And afterwards, towards the end of the term, Lord *Ellenborough*, Ch. J., after adverting to the motion which had been made, and to the two cases which were then mentioned, observed, that in the latter of them the court appeared to have considered the application as a matter within their discretion; and no injustice having been done, they had refused to interfere. His lordship then said, that he had mentioned this case to all the judges, and they were all of opinion, that it was a matter within their discretion to grant or refuse a new trial on such a ground; and that if no injustice had been done, which was not pretended in this instance, they would not interfere in this mode, but leave the party to get rid of the verdict as he might: that if they were to listen to such an objection, they might set aside half the verdicts given at every assizes, where the same thing might happen from accident and inadvertence, and possibly sometimes from design, especially in criminal cases.

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(1) *Willes*, 484.

The two cases, although apparently, are not in reality at variance. In both instances a son personates his father : but in the one it seems to have been taken for granted the juror was qualified, and the objection went to the irregularity of his not having been summoned : in the other he was disqualified, being a minor and destitute of property, and therefore legally incompetent. This was something more than a mere formal objection. Had he been returned agreeably to all the forms, but no opportunity allowed to challenge him, his incompetency had remained, and the objection been entitled to the same consideration. Upon this distinction the court lay great stress in *Tremaine's* case, and thus avoid collision with the principle established in *Hill v. Yates* ; and the rule to be extracted from both is, that when in empannelling the jury there is blameless omission or misapprehension of the forms, it will not vitiate the verdict, but if in addition to this the juror be legally disqualified, and no opportunity given to challenge him, the verdict will not cure the defect, and a new trial will be granted.

The "case of a juryman,"(1) referred to in *Hill v. Yates*, and *Rex v. Tremaine*, was this : after the business on the crown side, at the summer assizes for the county of the town of *Newcastle*, was finished, it was discovered that *Robert Curry*, who served upon the jury, had answered to the name of *Joseph Curry* in the sheriff's panel, and had been sworn by that name. Upon further inquiry, it appeared that there was a person of the name of *Joseph Curry* belonging to *Newcastle*, but not at that time resident within the town or county : that *Robert Curry* was qualified to serve on juries, and had been summoned by the bailiff to attend on the crown side as a juryman at this assize. All this was mentioned to Mr. Baron *Eyre*,

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(1) 12 East, 231.

who conceiving it to amount to nothing more than mere misnomer in the panel of the jurymen intended to be returned, and who did serve, and that it was but cause of challenge, which on being stated would have been instantly removed by altering the panel: and that after judgment it could not be assigned as error, did not incline to interpose upon the ground of a supposed irregularity in the proceedings: but Mr. Chamber and Mr. Villiers, (counsel,) having afterwards, in the *nisi prius* court for the county of Northumberland, stated these facts to the baron, and pressed them as amounting to a mis-trial, the baron thought fit to respite the execution of a convict for forgery, that he might have an opportunity of advising with the judges upon this occurrence. On the first day of *Michaelmas* term, 1783, the judges were unanimously of opinion that this was no ground of objection, even if a writ of error were brought; much less on a summary application.

In this case the juror was duly qualified. All the forms had been complied with, and being the person intended, he answered to the call of *Joseph Curry* without correcting the mistake, thus presenting a case of the slightest imaginable informality, and clearly falling within the province of judicial discretion.

3. A variance in the name of one of the jurors, and that whether christian or surname, has been held fatal, and a new trial ordered.

Thus, in *Fermor v. Dorrington*.<sup>(1)</sup> Action for words, which were, "I will prove Fermor to be a perjured knave:" after verdict it was alleged that in the *venire facias* and *distringas*, one Taverner was named one of the jurors, but in the return of the *distringas* in lieu of *Taverner* one *Turnor* was returned, and was sworn, and tried the mat-

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(1) Cro. Eliz. 222.



ter ; so, say the court, it is a mis-trial, being tried by one that was not returned in the *venire facias*, and Coke cited a precedent in this court between Dousby and Willot, where a juror was returned by the name of *Gregory Wil-lot*, and in the *distringas* he was named *George W.* and he with others passed upon the inquest, and for this cause the judgment was stayed : and another precedent in the exchequer, where one *Mizael* was returned upon the *venire facias*, and upon the *distringas* one *Michael*, and both these were returned for surnames : and because *Michael* was sworn, &c., the judgment was stayed, and so it seemed to the court : but they at first doubted if the variance in the surname be a cause to stay judgment, but for variance in the christian name they agreed clearly the judgment shall be stayed, but one may have two surnames : but afterwards it was resolved the judgment should be stayed.

So in a case of attainr, *Hassett v. Payne*, (1) Coke showed to the court, that in the first *venire* of the petit jury, one *George Ellinger* was returned, and upon the *distringas* *Gregory Ellinger* was returned, and appeared in lieu of *George Ellinger*, and was sworn and tried the matter : so the trial was by eleven, and then no attainr lieth : and of this opinion was the whole court, and for this cause the attainr was stayed.

A distinction was early taken between the christian and surname, Thus in *Displyn v. Sprat*, (1) In the *venire facias* one of the panel was named *Tho. Barker of D.*, and in the *distringas juratorum* he was left out, and *Tho. Carter de D.* put in his place : and at the nisi prius *Tho. Carter* was sworn, and with others tried the issue. Coke alleged this in arrest of judgment ; for now there were but eleven of the panel, *Tho. Carter* being mistaken, and falsely named for *Tho. Barker*, as in a *venire facias* a juror was returned

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(1) Cro. Eliz. 256.

(2) Ibid. 57.

by the name of *George Thompson*, and in the *distringas jurat.* he was named *Gregory Thompson*, and sworn at the *nisi prius*; and this was held a void verdict. But the court said, there is a great difference between a mistake in the name of baptism and in the surname: for a man can have but one name of baptism, but may have two surnames.

At common law, however, both names stood upon the same foot; but by 21 *Jac. I.* to provide against mistakes in the surname it was specially enacted, that "no judgment shall be stayed or arrested after a verdict, because any of the jury who tried the issue is misnamed, either in the surname, or addition in any of the jury process, or in any return thereupon, so as upon examination it appears to be the same person who was meant to be returned." This settled the point as to surnames, but left the christian name as before. But it has been since held in *Roe v. Devys*,<sup>(1)</sup> that though the statute 21 *Jac. I.* extended only to surnames, christian names were amendable at common law, as being on misprisions of the clerk.

It obtained as a general rule, therefore, as well before as since the statute of James, that when the juror who serves has been summoned by his right name, and is the same person returned and sworn, although by a mistaken name the irregularity is amendable, and will not be allowed to prevail either on motion in arrest of judgment, or for a new trial. Thus in *Wrey v. Thorn*.<sup>(2)</sup> This was an action for breaking and entering plaintiff's close, &c. Defendant justified in right of a way—plaintiff replied *extra viam*; whereon issue was joined, and a special jury and view applied for and granted. The name of *Henry Luppincott* of Alverdiscott, Esq. was taken out of the freeholder's book, and he stood as a juryman, and was returned among the other jurors, in the panel annexed to the writ of *venire*

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(1) *Cro. Car.* 563.

(2) *Barnes*, 454.

*facias* ; and was summoned, and did attend both on the view and at the trial. After a verdict for the plaintiff on the merits of the cause, defendant moved to set aside the verdict, Mr. Luppincott's christian name being *Harry*, and not Henry ; and produced an affidavit thereon from two persons. *Per Cur.*—"This affidavit ought not to be received in a motion for a new trial. The record and all the jury process are uniform. Mr. Luppincott is the real person returned, and intended to be a juror, and there is no pretence that the verdict is unjust. It is commonly understood, that *Henry* and *Harry* are the same name : or that Harry is the same name as Henry corruptly spelled. The rule to show cause why the verdict should not be set aside was discharged."

And in the *Countess of Rutland's* case.(1) In debt on a bond of £500, brought by the Countess of Rutland, the defendant pleaded to issue, and it was found for the plaintiff. And now in arrest of judgment it was showed, that one *Robert Moore* was returned on the *venire facias*, and so named in the distress, but in the panel before the justices of nisi prius, by misprision he was named *Robert Mawre*, and so on the *postea* : upon which it was said, that a stranger who was not returned, was sworn and gave a verdict ; for which cause judgment should not be given. But it was resolved by the whole court, that if it could appear by examination, that his right name is Robert Moore, so that he is well named in the panel on the *venire facias*, and also that he is the same man who was returned and was sworn, there, the *postea* should be amended. But if a juror be misnamed, in the panel of *venire facias*, though he be well named in the subsequent process, it cannot be amended.

So in *Codwell's* case.(2) In an appeal of mayhem between John Codwell plaintiff, and Thomas Parker defend-

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(1) 5 Co. 42.

(2) Ibid.

ant, the parties came to issue, and the jury found for the plaintiff: and now it was moved in arrest of judgment, that there was a variance between the panel of the *venire facias*, and the *distringas* and *postea*, in the name of one of the jury, who appeared and gave a verdict: for in the panel of the *venire facias* he was named *Palus Cheal*, and in the *distringas* and *postea* he was named *Paulus Cheale*; and because the name of the juror was misnamed in the *venire facias*, and especially in his christian name, therefore the judgment was arrested: but if he had been well named in the panel of the *venire facias*, and misnamed in the *distringas* or in the *postea*, there on examination it should be amended.

So in *Cotton's case*.(1) Action for words. In the *venire facias* a juror was returned by the name of J. S. of Abbotsan, and in the *distringas* he was returned by the name of J. S. of Abbasan: and it was awarded to be amended; so in the same term between Mortimer and Oger, a juror in the *venire facias* was named *De Hust*, and in the *distringas* *De Hurst*, and this was alleged in arrest of judgment, and awarded good, and the plaintiff had judgment.

So in *Hugo v. Payne*,(2) where *Tippet* the true name was returned on the *venire* but in the *habeas corpora* and *distringas* he was named *Typper*: yet if he be sworn and try the issue by his right name it shall be amended: and in the case of *Floyd v. Bethell*.(3) In the *distringas* the juror was *Ap Pell* and one *Ap Bell* was sworn, and held that it could not be amended by the court after the death of the sheriff: for it cannot be intended to be the same man, for they are different names in Wales where this trial was, but that if the sheriff who made the return had been living he might have amended it. Several more

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(1) Cro. Eliz. 258. (2) Danv. Abr. 330. (3) Ibid. 331.

cases are there cited, showing that where the mistake is in the surname, but if right in the return to the *venire*, the court would amend it.

So in *Roe v. Devys*.<sup>(1)</sup> In the return to the *venire* a juryman was named *Samuel*, and so in the *distringas*, but in the panel annexed he was called *Daniel*, and sworn by that name as appears by the record, and gave a verdict for the plaintiff: though this was not within the statute, yet it appearing upon the examination of the juror himself that he was the person returned, and that his right name was Samuel, and that there was no other person of that name in the parish, and by the examination of the sheriff, of his clerk, that it was the misprision of the clerk, who though he had the *distringas* before him wrote Daniel for Samuel in the panel; and the juror likewise swearing that there being a great noise in the court when he was sworn, he answered supposing himself to be called by his right name of Samuel, the record, was ordered to be amended and the judgment was not stayed.

In England the correctness of the rule has been tested even in capital cases, since *Hill* and *Yates* and "The case of the juryman," and therefore may be regarded as settled.

In the state of New-York mistakes of this kind are cured by the statute. It is provided that "When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed: nor shall the judgment upon such verdict, or any judgment upon confession, default, *nihil dicit* or *non sum informatus* be reversed, impaired, or in any way affected by reason of a mistake in the name of any juror or officer."<sup>(2)</sup> And should a question arise upon this defect, it is further provided "The omissions, imperfections, defects, and variances in the preceding sec-

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(1) Cro. Car. 563.

(2) 2 R. S. 425. § 7. 11.

tion enumerated, and all others of the like nature, not being against the right and justice of the matter of the suit, and not altering the issue between the parties, or the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error.”(1)

4. And it has been held, that if one of the regular panel be challenged and set aside, and afterwards be sworn upon the jury as a talesman, especially if the party were ignorant of the fact, a new trial will be granted.

In *Parker v. Thornton*.(2) After a verdict for the plaintiff a new trial was granted, because one *Hooper*, who was challenged upon the principal panel, and the challenge allowed, was afterwards sworn upon the jury as a *talesman* by the name of *Hook*; although it was insisted upon, by the counsel for the plaintiff, that the verdict was given to the satisfaction of the judge who tried the cause.

So where the cause of challenge is not known.(3) As in *Kennedy v. Williams*.(4) In this case the objection could not be taken because the facts were not known till after the verdict. A sufficient number of jurors did not appear, and talesmen were summoned and returned and sat on the trial, who had not been drawn according to the statute, and a new trial was directed.

But it would seem if the party objecting were not misled, as he probably was in the case from Lord Raymond, by the misnomer, but neglected his challenge, the verdict would not be disturbed.(5) In *Jordan v. Meredith*,(6) where a talesman was sworn on the jury after being struck off

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(1) 2 R. S. 425. § 8.

(2) 6 Bac. Abr. 661.

(3) Vide 1 Vent. 30. Style, 129.

(2) 2 Lord Raym. 1410.

(4) 2 Nott & M'Cord, 79.

(6) 3 Yeates, 318.

the list of special jurors the court held that the objection came too late. "The defendant should have challenged the juror before he was sworn. He has slipped his time by postponing his objection till this period. If he has been guilty of inattention he alone should suffer for it. And so is the current of authorities in the books. Motion for a new trial denied."(1)

In *Haskell v. Becket*.(2) The petitioner prayed for a review of a suit heretofore decided between him and the respondent, in which he represented that the verdict was improperly returned against him, because one of the jurors did not stand impartial between the parties, but had before the trial, formed and expressed a decided opinion against the petitioner's right to recover; and had also manifested and expressed sentiments of prejudice and hostility against the petitioner, inconsistent with that fairness and impartiality which by law is required of jurors. The facts set forth in the petition were proved, and the juror himself was called on to explain in open court. He admitted he had spoken on the subject, but denied prejudice and bad feeling to the petitioner. *Per Curiam*—"It is alleged by the petitioner, that the trial of his cause was not a fair one, because one of the jurors entertained feelings of hostility against him, resulting from supposed injuries which the petitioner had offered him. How far this fact, if unexplained, might go, it is not necessary now to determine; yet of itself it might probably induce the court to send the cause to another jury. But it seems to have been as well known to the petitioner before the trial as now; and if he would object to the juror for this cause, the objection should have been taken at the trial: not being taken then, it is waived."

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(1) It has been so ruled in South Carolina, in a capital case.—2 Bay, 150.

(2) 3 Greenl. 92.

5. It is a general rule to refuse a new trial for the mistakes or omissions of officers charged with the summoning and empanelling of the jury where no fraud or collusion is intended, or injury to the parties ensues.

Thus in *The King v. Hunt*.<sup>(1)</sup> Where a special jury was ordered and only ten jurymen appeared, two of those named in the panel not having been summoned, and two talesmen were sworn on the jury, on motion for a new trial, it was contended that it was indispensable the whole panel should be summoned; that the statute is imperative, and that if two may be omitted, so may any other number, and so a selection of particular persons to try the cause. But per *Abbott*, Ch. J. "No case has been cited which is a direct authority on this question so as to form a ground for our decision: we must, therefore, look to the principle on which this application is founded. There has in this case been an omission to summon two of the special jurymen. The court is not, without proof, to suspect any fraud on the part of its officers. It is not suggested in this case that the omission has been in consequence of collusion with any other person. If then, on these affidavits, we were to grant a rule, we should intimate it to be our opinion, that in every case which may be tried, whether civil or criminal, if the party against whom the verdict passes chooses to apply, he will be entitled, as of right, to a new trial, in case he shows to the court that any one jurymen has not been duly summoned to attend. This would be going a great deal too far. I think, therefore, that we ought not to grant this rule." With this result, the other judges concurred delivering their opinions *seriatim* and the rule was refused.<sup>(2)</sup>

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(1) 4 Barn. & Ald. 430.

(2) Vide *The King v. Pritchard*, *Ridgway's Cases*, Hard. 144.



In *Amherst v. Hadley*.<sup>(1)</sup> Verdict for the plaintiffs. The defendants moved for a new trial, because one of the jurors was chosen and drawn more than twenty days before the sitting of the court at which the *venire facias* was returnable, contrary to the statute, which fact did not come to the knowledge of the defendants, or of their counsel, until after the verdict. *Per Curiam*.—"The court are of opinion that the motion to set aside the verdict cannot be sustained. No objection is made to the personal qualifications of the juror. It is admitted, or not denied, that his name was regularly in the jury box of the town of Enfield, and that he was what the law terms *liber et legalis homo*. This is a sufficient answer to the cases in which the jurymen were from a wrong vicinage, or were non-jurors. Had any fraud been proved, or had the defendants suffered any real prejudice, without their fault, no doubt the verdict should be set aside. Had it been shown that the jury had been tampered with, which it was the object of the statute to prevent, in requiring the jurors to be drawn not more than twenty days before the sitting of the court, this would be a good reason for granting a new trial. But here is a mere question of law, whether the defect appearing on the record would be sufficient to sustain a writ of error. The case comes before us, indeed, on a motion for a new trial, which is a summary proceeding, and does not preclude the party from bringing his writ of error if decided against him, but if the court were of opinion that error will lie, they would grant the motion in order to save trouble and expense."

A question somewhat similar, and receiving a similar decision, but for a different reason, that the objection ought to have been taken before the verdict, came before the same court, and is thus reported in a note to the case from Pick-

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(1) 1 Pick. 38.

ering.(1) At the previous March term of the court of common pleas for the county of Bristol, two jurymen *de talibus circumstantibus* were returned, to complete the panel for the trial of a cause then before the court, and were sworn to give a true verdict in all causes between party and party that should be committed to them. The same jurymen afterwards sat in the cause of *Howland v. Gifford*, without being again returned or again sworn. After the verdict the defendant moved for a new trial on this ground, but the judge overruled the motion, and the defendant filed his exceptions. After argument in support of the exceptions, and *é contra*, this court said that it was no doubt irregular for the talesmen to serve in any cause except that for which they were returned; but the objection should have been made before the verdict. The judgment of the court below was therefore affirmed.

So, in what might be considered a case of gross carelessness, *Cole v. Perry*,(2) but no abuse nor injury to the party appearing, a new trial was refused. It was moved that the verdict be set aside on the ground of irregularity in drawing the petit jurors. The names of the jurors summoned and empannelled at the circuit were written on several and distinct pieces of paper, being all as near as might be of equal size, and put into boxes open at the top by an orifice of about five inches in diameter, from which they were drawn to compose the several juries: that they were not rolled or folded together, and that the names of the jurors were easily and distinctly visible to the person drawing. But *Per Cur.*—"The statute relied upon, is merely directory to the officer drawing the ballots. We have often holden this in relation to statutes of a similar character. No abuse or injury to the defendant being pretended, and no objection made at the time, the mistake

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(1) 1 Pick. 49.

(2) 6 Cowen, 584.

of the officer is not ground for setting aside the proceedings."

It would then appear, that in mere matters of form in empannelling a jury, the courts, both in Great Britain and this country, have refused to interfere, when points merely technical, and unproductive of any injury, have been presented; and have, by a series of decisions, placed all applications of this kind within the principle of judicial discretion.

This, with us, does not depend on judicial decisions merely, or legal inferences from any given statement of facts. It is expressly provided by statute, that no verdict shall be affected for any imperfect or insufficient return of any sheriff or other officer, or that the name of such officer is not set to any return actually made by him.(1) Nor for any other default or negligence of any clerk or officer of the court, or of the parties or their counsellors or attorneys, by which neither party shall have been prejudiced.(2) And that all such omissions and defects, and *all others of the like nature*, shall be supplied and amended by the court.(3)

In the recent case of *The People v. Ransom*,(4) the court took occasion to review the principal cases, with the grounds of irregularity in empannelling the jury, and refused a new trial under the following circumstances—motion to set aside a verdict for irregularity in empannelling the jury. The prisoner, who was indicted for murder, was put upon his trial at the New-York oyer and terminer, on the 22d September, 1831. The general panel of petit jurors was called over, and a jurymen of the name of *Robert Smith* answered when his name was called. The clerk then proceeded to draw the jury

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(1) 2 R. S. 425. § 7. (3.)

(2) *Ibid.* § 8.

(2) *Ibid.* (14.)

(4) 7 *Wendell*, 417.

for the trial of the prisoner, by taking ballots containing the names of the jurors returned from the box in which they were contained. When twenty-eight jurors had been called, eleven of whom were sworn, and seventeen peremptorily challenged by the prisoner, the clerk announced that no more ballots remained in the box. The counsel for the prisoner stated that the name of *Robert Smith* had not been called. The clerk searched for the ballot containing his name, found it, and informed the court that it had not been put into the box with the names of the other jurors previous to calling the jury in this case, and explained the omission in the following manner: On the first day of the session of the court, to wit, the 19th September, when the panel of petit jurors was called, Robert Smith did not appear, and therefore his name was not put into the box. On the 21st September, Smith appeared in court, excused his default, and was sworn as a juror in the circuit court, but the clerk neglected to put his name into the box. On that day there was no trial in either the circuit or oyer and terminer. Upon this statement being made, the district attorney moved the court, that the eleven jurors who had been sworn should be discharged, that the names of all the jurors should be returned to the ballot box, and that the drawing commence *de novo* as if no jury had been drawn; which motion was resisted by the counsel for the prisoner. The court, after consultation, ordered the ballot with the name of Robert Smith upon it to be put into the box, and to be drawn out of it as a juror in that case. To this order and decision the prisoner's counsel excepted. Upon the name of Smith being drawn from the box, the district attorney challenged him for cause, and after he was examined on oath the challenge was withdrawn, and he was sworn and empannelled as a juror. The prisoner was found guilty, and the court of oyer and terminer respited his sentence, until the advice of this court could be obtained in the premises. An affidavit of the clerk of the oyer and terminer

was submitted, stating the omission to place the ballot containing the name of Smith in the box was not designed, but owing entirely to neglect.

In commenting on this case, *Sutherland*, J., who delivered the opinion of the court, observes, that the true rule to be collected from all the cases is, that to entitle the defendant to a new trial, he must show himself to have been prejudiced by the irregularity, and concludes, "Whatever irregularity therefore there may have been in this case, it is most evident that it has not affected, or prejudiced in any manner the rights of the prisoner, and that he is not, according to the best established principles, entitled to a new trial."

So, if the judge overrule a challenge to a juror, after declaring he has formed an opinion, as in *Blake v. Millspaugh*.<sup>(1)</sup> On *certiorari* from a justice's court. On the jurors being called, the defendant below objected to one of them, alleging, as a cause of challenge, that the juror had previously expressed his opinion, that the roll so taken by the defendant was unlawful and not authorized by the act, and, at the same time, offered to verify, by proof, the truth of the exception; but the justice overruled the objection, and allowed the juror to be sworn, and a verdict was found for the plaintiff. *Per Curiam*.—"We think the challenge was well taken. That a juror had previously given an opinion on the very question in controversy, was a valid exception to his being sworn to try the cause; the defendant's proceeding to trial on the merits, afterwards, is no waiver of the exception, nor does it preclude him from alleging the misdirection of the judge as error."<sup>(2)</sup>

#### 6. The objection to a grand juror, by reason of partiality

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(1) 1 Johns. Rep. 316.

(2) Vide 8 Johns. Rep. 445. 6 Cowen, 565. 4 Wendell, 232—  
and 1 Burr's Trial, 419.

and dislike, or want of the qualification of property, must be taken before indictment found, otherwise it would not avail to quash the proceedings, much less to set aside the verdict.

The former of these objections was overruled, on a motion to quash the indictment, in *The People v. Jewett*.<sup>(1)</sup> The defendant in support of his motion, among other things, showed, that Benjamin Wood, one of the grand jurors, had, before the finding of the bill of indictment, in repeated conversations, declared, that the defendant was concerned in the abduction of Morgan; aided in carrying him off; was guilty thereof; and ought to be punished therefor. And that in such conversations Wood discovered great malignity of feeling, and bitter hostility against the defendant.

*Savage*, Ch. J., commenting on this part of the case, observes: "As to Wood, the other juror, good cause of challenge existed. There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison, or out on recognisances; and it is even said that a person wholly disinterested may, as *amicus curiæ*, suggest that a grand juror is disqualified. But such suggestion, to be availing, must be made previous to the juror being empannelled and sworn." Again, "I cannot consent that after an indictment found, the party charged may urge an objection of this kind, in avoidance of the indictment. The books are silent on the subject of such exception after indictment found; and in the absence of authority, I am inclined to say, in consideration of the inconvenience and delay which would unavoidably ensue in the administration of criminal justice, was a challenge to a grand juror permitted to be made after he was sworn and empannelled, that the objection comes too late."

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(1) 3 Wendell, 314.

*Marcy, J.*, remarks, "I have had more difficulty in disposing of the objection made to *Lacey* and *Wood*—What is urged against *Wood* particularly, would have been sufficient to exclude him, on a challenge upon the ground of favour; though on the argument it was said to be otherwise by the counsel for the people. 'The opinion of *Ch. J. Marshall*, on the trial of *Col. Burr*, and of *Woodworth, J.*, in the case of *The People v. Barker*, are decisive of this question. If the objection to these jurors could have been presented when they were empanelled, and the facts on which it rests properly authenticated, I think it would have been sufficient to exclude them." Again; "Though I feel the force of the argument, that the defendant should be allowed the benefit of an exception to a partial grand juror, I cannot turn my view from the consideration of the great delays and embarrassments which would attend the administration of criminal justice, if it was to be obtained in the way now proposed. No authority for adopting this course was shown on the argument, and I have not since been able to find any. It would be a novel proceeding, and there is reason to fear it might be followed with more serious difficulties than are now foreseen."

The latter objection, as to the qualification of property, was disposed of in the case of the same defendant, on a question afterwards brought up on demurrer. He had pleaded to the indictment that *J. W. S.*, one of the *grand jurors*, by whom the indictment was found before and at the time when he was empanelled, charged and sworn as a grand juror, had not a freehold of the value of \$150; nor was he in possession of lands under a contract for the purchase of the same and worth \$150 in personal property; nor had he made improvements on such lands to the amount of \$150 free from all reprises, debts, or incumbrances whatsoever. Wherefore he prayed judgment of the indictment, and that the same might be quashed, &c. The opinion of the court was delivered by *Sutherland, J.*,

concluding thus : "I apprehend a verdict, either in a civil or criminal case, would not be set aside merely on the ground that one or more of the jurors had not the property qualification required by law. It very frequently occurs that such mistakes are made in the panel ; and jurors undoubtedly, sometimes, serve without the requisite legal qualifications. But if the objection is not raised when the jury is drawn, the parties are concluded, although the fact may not have come to their knowledge until after the trial. I speak of strictly legal and technical objections which go to the character of the juror, and show that he laboured under prejudices and prepossessions which render him incapable of acting impartially in the case, and that in all human probability there had not been a fair trial. The objection presented by the plea to the indictment in this case is simply, that one of the grand jurors was not a freeholder, &c. This, in a civil case, would not be a sufficient ground, *per se*, for setting aside the verdict of a jury, although the law expressly requires that petit jurors shall be freeholders. Much less ought it to prevail against an indictment, for the reasons which have already been stated." (1)

A principal challenge to a grand juror before bill found, and to a petit juror, before he is empannelled, stand upon the same footing ; and if in the latter case, the challenge is good and seasonably interposed, yet overruled, a new trial will be granted.

In *The People v. Vermilyea*. (2) One Norwood was called as a juror, and challenged for principal cause. He testified he had heard all the evidence given on the former trial, having been present at it ; that he had made up his opinion perfectly on the evidence, that the defendants were all guilty. Upon being inquired of by the district attorney he stated that he felt no bias or partiality against any of

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(1) *The People v. Jewett*, 6 Wendell, 386.

(2) 7 Cowen, 106.



the defendants ; and added, that he thought he felt competent to give a verdict according to his oath, and the evidence as it should appear. The court decided that the juror stood indifferent, and he was accordingly sworn. An exception was interposed, and with the challenge was returned upon the record for error. *Woodworth, J.*, delivering the opinion of the court, after a review of all the authorities, proceeds : "The remaining question is, was the opinion expressed by *Norwood* a ground of principal challenge ? The court below judged rightly in considering it made for principal cause. Such challenges are for causes which, in judgment of law, indicate bias, or which, if found true, are sufficient of themselves, without being submitted to the direction of triers ; or for causes which prove evident favour or enmity in the juror. If I have not erred in what I have already said, the law does presume that the expression of an opinion on the merits of a case indicates bias, or that the mind of the juror is decidedly unfavourable to the defendants. It is then a principal cause of challenge. All the authorities I have cited, prove this to be correct. When the law has declared the consequences of a fact, if the fact be established, it becomes the duty of the court to make the application." After a comparison of the illiberal policy of English jurisprudence towards the accused, with the benign practice of our courts, the learned judge concludes : "I have now examined all the questions deemed material in this case. My brethren on the bench concurring in the views I have taken, the consequence is, that a valid principal cause of challenge having been overruled in the court below, a new trial must be granted."

## CHAPTER III.

### FOR MISCONDUCT OF THE PREVAILING PARTY, HIS AGENTS OR COUNSEL, ON THE TRIAL.

THE purity which ought to prevail in courts of justice, will not permit those who approach them to resort to artifice or fraud. All attempts to tamper with justice, are prohibited under the severest penalties. And should a party succeed by adopting a tortuous policy, his success will be of short duration.

It is a general rule that all unfair management, trick, fraud, and artifice, in the course of a trial, and especially attempts to tamper with, or influence, or labour the jury, will vitiate the verdict.(1)

1. If papers, not previously submitted, be surreptitiously handed to the jury, bearing materially on the point at issue, it will avoid the verdict.

The rule is thus laid down by Lord Coke: "If the plaintiff, after evidence given, and the jury have departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in issue, or any evidence, or any escrowle touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, *et sic e converso*. But if the jury carry away any writing unsealed, which was given in evidence

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(1) 2 Arch. Prac. 225. Gra. Prac. 509.

in open court, this shall not avoid their verdict, albeit they should not have carried it with them.”(1)

In *Goodman v. Cotherington*,(2) a new trial was moved for upon several affidavits that at the last Gloucester assizes, the jury being charged with an issue concerning a copyhold, after they had heard the evidence, and when they had departed from the bar, one of them went from his companions and then returned to them, and brought a court-roll with him, and said that he knew the matter and was for the plaintiff: and then, although the rest of the jurors thought otherwise before, they submitted to this juror and found for the plaintiff: and the court, for this misbehaviour, awarded a new trial.

And in Lord *Shande's* case,(3) in the time of *Rolle*, Ch. J., after a trial at bar, a new trial was granted, because the plaintiff had delivered a paper to the jurors, after they departed from the bar.

In *Heyler v. Hall*, in ejectment, it became a material question when one *Pratt* became a bankrupt, and after evidence given, and the direction of the court, the plaintiff's solicitor delivered to the jury, in the face of the court, (but this was not observed,) as they were departing from the bar, the depositions of *Pratt*, taken in chancery, which, by his own confession, proved him a bankrupt at the time pretended by the plaintiff; (but these depositions had before been read unto them in court;) they afterwards returned and were ready to give a verdict for the plaintiff; but the other party, by the counsel, showed this to the court, and the jury were examined each of them upon oath, if more was read to them after the departure than was read to them in open court, and they agreed that there was not. 2. They were asked how they were inclined to give their verdict before they read the depositions; and some said,

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(1) Co. Litt. 227.

(2) 1 Sid. 235.

(3) 2 Morgan, 20.

that they were inclined to find for one and others for the other : and upon this the solicitor was committed for his misdemeanor, and the verdict taken *de bene esse* ; and the officer of the court was commanded to make a record of all this matter after the verdict. And upon this statement it was adjudged by three of the justices, " that the verdict be quashed, and a *venire facias de novo* awarded for the reasons : 1. Because the jurors might not think of the answers which counsel on the other part would apply to this evidence if it had been again given in court. 2. Because, perhaps, upon this, the court would have given another direction." (1)

But if no one on the behalf of the party conveys the paper to the jury, and it should appear probable that it was previously in possession of a juror, it has been held to fall within the principle, that a juror may communicate to his fellow jurors what he knows of the case, and for that the verdict will not be disturbed. In *Graves v. Short*, (2) one of the errors assigned was, that the parties being at issue, whether a feoffment were made, and the jurors at *nisi prius* being gone together to confer, William Malevory, one of the jurors, showed to the residue of the jurors an escrow in writing, which had not been submitted in evidence, by reason of which they found for the demandant. And after argument at the bar, the court resolved, that it was not any error, nor could be alleged for error : for it doth not appear that it was evidence given to the juror by any of the parties, or by any other in behalf of the plaintiff : but it shall be intended that he showed it of himself, and that it was a piece of evidence which he had about him before, and showed it to inform himself and his fellows ; and as he might declare it as a witness that he knew it to be true, so he might show any thing which he knew.

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(1) Palmer, 325.

(2) Cro. Eliz. 616.

So if the papers handed to and carried out by the jury contain matter irrelevant or immaterial, so as to make it improbable it could affect the merits of the controversy, the verdict will be permitted to stand.

In *Lonsdale v. Brown*,<sup>(1)</sup> the defendant moved for a new trial for this cause, among others, that the jury took out with them a deposition, part of which was objected to at the trial, and the objection allowed. And per *Washington, J.*—"If the parts of the deposition which were not read were material to the plaintiff's case, we should think that the verdict ought not to stand."<sup>(2)</sup> So if the deposition had been delivered to the jury by the plaintiff's counsel without the consent of the other side, although it fully appeared that the rejected parts had not been read to the jury. But if the evidence be altogether irrelevant and immaterial to the issue, and the deposition is taken out by the jury by mistake, we think it would be going too far to set aside the verdict when the court cannot but perceive that it could not have influenced the finding of the jury."

2. If the party, or any one on his behalf, directly approach a juror on the subject of the trial.

As in the case of a witness who repeats his evidence apart to the jury. In *Metcalf v. Dean*.<sup>(3)</sup> The jury were gone from the bar to confer of their verdict. One of the witnesses, that was before sworn on the part of Dean, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for Dean. And complaint being made to the judge of the assizes of this misdemeanor, he examined the inquest, who confessed all the matter, and that the evidence was the same in effect

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(1) 4 Wash. C. C. Rep. 149.

(2) Vide 5 Mass. Rep. 405.

(3) Cro. Eliz. 189.

that was given before *et non alia nec diversa*; and this matter being returned upon the *postea*, the opinion of the court was that the verdict was not good, and a *venire facias de novo* was awarded.

With this agrees *Thompson v. Mallet*, in Error,(1) where the jury, after they had left the court and retired into their room, had taken upon them to send for and examine a witness who had not been sworn and examined in court, without leave of the court, or consent of the parties or their attorney; though this was not known at the time their verdict was received and recorded in court, but came out after they had been discharged. The judges unanimously, without argument, ordered a new trial without costs, observing that this was very reprehensible conduct on the part of the jury, for which they had deserved to be fined, if it had been known to the court before they were discharged.

So, in *Knight v. The Inhabitants of Freeport*.(2) A new trial was moved for on the part of the defendants, on the ground that one *Briggs*, who was a witness for Knight, on the trial of the cause, after the empannelling of the jury, and before the trial, applied to Justin Kent, one of the jurors, and stated to him that this cause was of great consequence to him, *Briggs*, and if it went against Knight, he, *Briggs*, should have to pay the costs, and that the defending the action was a spiteful thing on the part of the said inhabitants of Freeport, the counsel for the defendant declaring, that they had no knowledge of the said facts, until after the jury had returned their said verdict. The juror testified to the truth of the foregoing statement, and added that Knight was not present at the time, nor did the juror know that he, Knight, had any knowledge thereof. And it was admitted that the said *Briggs* was Knight's son in law, and did assist him in

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(1) 2 Bay, 94.

(2) 13 Mass. 218.

supporting his cause. *By the Court.*—"Too much care and precaution cannot be used to preserve the purity of jury trials. The attempt to influence the juror in this case was grossly improper, and ought to be discountenanced. It is not necessary to show that the mind of the juror thus tampered with, was influenced by this attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to set aside the verdict; and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes; and every one ought to know that for any, even the least, intermeddling with jurors, a verdict will always be set aside."

In *Blaine v. Chambers*,<sup>(1)</sup> there was a verdict for the plaintiff, and a motion for a new trial. One of the grounds was that a brother-in-law of the lessor of the plaintiff conversed with one of the jury concerning the cause, before and after he was sworn, who had declared he derived more information from him than from the court or jury. A new trial was ordered upon another ground. *Tilghman*, Ch. J., however, takes occasion to observe upon this objection. "It would be an injury to the administration of justice, not to declare that it is a gross misbehaviour for any person to speak to a jurymen, or for a jurymen to permit any person to converse with him, respecting the cause he is trying, at any time after he is summoned and before the verdict is rendered." And,

Per *Yeates*, J. "If the truth of the facts was correctly stated in the affidavits, the person who attempted to labour

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(1) 1 Serg. & Rawle, 169.

the jury merited the most severe punishment, as such conduct poisons the first sources of justice."

So, in *Ritchie v. Halbrooke*.<sup>(1)</sup> The verdict was for the plaintiff. The defendant moved for a new trial, upon grounds appearing in the opinion of the court, delivered as follows by *Tylghman*, Ch. J. "The verdict in this case having been for the plaintiff, a motion has been made on the part of the defendant for a new trial. In support of this motion, several matters have been offered both of law and fact; but there is one which demands particular attention. An affidavit has been produced of one of the jurors, by which it appears that a difficulty in the plaintiff's account having been mentioned after the jury had received the charge of the court, and retired to consider of their verdict, the foreman of the jury declared that the plaintiff had satisfied him, with regard to that difficulty, in a conversation which he had with him *out of court, and after the jury had been sworn*. The plaintiff's counsel contended that the court should pay no regard to this affidavit, because it is impolitic to permit jurors to relate what passed between themselves, and for this they relied on the case of *Cluggage v. Swan*.<sup>(2)</sup> That was a very different case from the present. The jury drew lots for the verdict and the court refused to hear the affidavit of one of the jurors to prove it. Whether jurors should be permitted to disclose their own misconduct, has been a *verata questio*. I declined giving any opinion on that point, in *Cluggage v. Swan*, because the case did not require it. There was enough to set aside the verdict on other grounds. But my brethren, the late judges Yeates and Brackenridge, certainly were decidedly of opinion that the affidavit of the juror should not be regarded. But it never has been, and, I trust, never will be doubted that the affidavit of a juror

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(1) 7 Serg. & Rawle, 458.

(2) 4 Binn. 150.



shall not be received to prove misbehaviour of *one of the parties to the suit*. The holding of conversations with jurors after they are sworn, is a practice against which the court should set its face resolutely, and put it down at once. It must be known that a party may lose, but cannot gain by a conversation with a juror after he is sworn, unless it be open, and by permission of the court. If the verdict should be against him, it would stand; if for him, it will be set aside."

So, in *Cottle v. Cottle*.(1) Where the prevailing party in a cause tried by jury, previous to the trial, but during the same term, conveyed one of the jurors several miles in his own sleigh, to the house of a friend, where he was hospitably entertained for the night; the verdict was for this reason set aside.

3. But if insidious attempts of this kind be known to, and it be in the power of, the other party to have it corrected, and he neglect, the objection will not avail to set aside the verdict. So ruled in *Herbert v. Shaw*.(2) The case was this: Upon an issue joined in an action between Lady Herbert, daughter of the Duke of Leeds, and the Fishermen of Milton, a letter was written by the Duke of Leeds to every particular jurymen, wherein he desired their appearance at the trial, and concluded his letter in these words: "which I shall take as a great obligation, particularly from yourself, and shall be glad of an occasion to show how much I am, sir, your humble servant." Upon which the defendant moved for a new trial. It was argued against the motion, that it could not be maintenance in the duke, being father to the plaintiff, and that it was the defendant's neglect, in not discovering the letter before the trial, and making his challenge, it appearing he knew of it

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(1) 6 Greenl. 140.

(2) 11 Mod. 118.

before. *Powell*, J., said he remembered a case in the court of common pleas, where a stranger wrote to a jurymen to consider that the plaintiff was a poor man ; for which a new trial was granted and the writer taken up and committed ; but here this seems only an invitation, and an endeavour for a full jury to appear, in order to avoid *a tales*, and a man may write in behalf of his daughter. But the doubt was as to the compliment here paid to the jurymen, by so great a man as the Duke of Leeds, and he thought the fact hardly justifiable, even in a father. And after the case had been twice argued, it was resolved by *Holt*, Ch. J., *Powell*, *Powys*, and *Gould*, Justices, that no new trial should be granted ; because the defendant having notice of such a letter long before the trial, might have moved for a trial at bar, which the other side had offered to consent to ; but taking the letter as it is in itself, it is of dangerous consequence, for it is a temptation to the jury to be partial, and takes off their indifferency. But again, if a party have cause of challenge, and know of it time enough before the trial, if he do not challenge, he shall not have a new trial : *contra*, if he has not timely notice of it. The party himself cannot give a jurymen money to appear, for it cannot be supposed that he will hire him to give a verdict against himself.

So, in *Suell v. Timbrell*.<sup>(1)</sup> On a motion for a new trial it was held, that desiring a juror to appear in the cause, which was between a miller and a baker, was no ground to set aside a verdict. And the court remembered the case of the Duke of Leeds, who wrote a letter to a juror, desiring him to attend, "and you will oblige your humble servant, *Leeds* ;" which was thought no reason to set the verdict aside.

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(1) 1 Str. 643.

4. If indirect measures are resorted to, to prejudice the jury, although the party may disclaim all knowledge and participation, a new trial will be granted.

In *Coster v. Merest*,<sup>(1)</sup> *Vaughan*, sergeant, had obtained a rule *nisi* for a new trial in this case, on an affidavit which stated that handbills, reflecting on the plaintiff's character, had been distributed in court at the time of the trial, and had been seen by the jury. *Lens*, sergeant, who showed cause against the rule, offered affidavits from all the jurymen, that no such placard had been shown to them; and though he admitted that, in general, affidavits on the subject of the cause could not be received from a jurymen, yet he urged that, as in the present case, no answer could be given to the plaintiff's statement, except by such affidavits, they ought to be received. But the court refused to admit the affidavits, thinking that it might be of pernicious consequence to receive such affidavits in any case, or to assume that a jury had been unduly influenced: and though the defendant denied all knowledge of the handbills, they made the rule absolute.

In *Spenceley v. De Willot*.<sup>(2)</sup> It appeared the plaintiff had made and published, and distributed about the court and the hall, a statement of his case, at and before the trial. The defendant moved for a rule *nisi* on two grounds, the rejection of evidence intended to impeach a witness on a fact wholly irrelevant, and the distribution of copies of the case. The court refused the motion on the first, but granted a rule *nisi* on the second ground alone.

So if artifice or trick be practised to prevent the attendance of witnesses.

Thus, in *Davis v. Daverill*,<sup>(3)</sup> in a motion for a new trial, on a suggestion, that the defendant arrested and im-

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(1) 3 Brod. & Bing. 272, and 7 Moore, 87.

(2) 7 East, 108.

(3) 11 Mod. 141.

prisoned one of the plaintiff's witnesses until the trial was over, it was adjudged to be good cause of granting a new trial.

And a verdict was set aside where a material witness for the defendant concealed himself in the plaintiff's house. *Montpesson v. Randle*, thus noted by Buller. "A material witness for the defendant concealed himself in the plaintiff's house to avoid being served with a subpoena, by which means the plaintiff obtained a verdict, but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial when she knew the defendant could not make a defence."<sup>(1)</sup>

But it would appear, that if a party were libelled by a mere stranger, it would be sufficient cause for postponing the trial, but not for setting aside the verdict. So ruled in *Rex v. Burdett*,<sup>(2)</sup> *Rex v. Gray*,<sup>(3)</sup> and *The King v. Jolliffe*.<sup>(4)</sup>

So if means are adopted which have the effect of preventing witnesses from attending, that cannot be traced to the party or his agents, it would appear, a new trial would not be granted. In *Grovenor v. Fenwick*,<sup>(5)</sup> after a trial at bar, and verdict for lessees in ejectment, a new trial was moved for upon the merits of the cause, and also upon an affidavit containing, in substance, that the defendant's witnesses were kept back by a report spread in Holland, when they were on their way to England, and that the witnesses that were already come over had been laid by the heels; but it did not name any one who had spread the report, or that it was by the agents or persons employed by Fenwick. And though the court were dissatisfied with the verdict for several reasons, one of which was, that the trial lasted above sixteen hours, and abundance of evidence was given on

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(1) Bull. N. P. 338.

(2) 2 Salk. 645.

(3) 1 Burr. 510.

(4) 4 Term. Rep. 285.

(5) 7 Mod. 156.

both sides, and the jury were agreed on their verdict in half an hour's time ; yet the court would not grant a new trial, but declared, that after a trial at bar they would not easily grant a new trial, more especially in ejectment, where the first verdict is not peremptory, and where there is no foul practice made to appear in the jury or party for whom the verdict was, as keeping back of witnesses, &c., in which cases alone it was discretionary in the court to grant it.

5. It is a general rule, that all disingenuous attempts to stifle or suppress evidence, or to thwart the proceedings, or to obtain an unconscionable advantage, or to mislead the court and jury, will be defeated, by setting aside the verdict.

Thus, in *Anderson v. George*.<sup>(1)</sup> Upon a rule for the plaintiff to show cause " Why a verdict should not be set aside and a new trial ordered upon payment of costs." The plaintiff had sold goods to the defendant, who paid for them by a promissory note of one *Hopley* : which the defendant endorsed. The plaintiff demanded the money of *Hopley*, but indulged him with further day of payment several times, till he failed. The only dispute between the parties was, " Which of them ought to bear the loss of this note ;" for the plaintiff was paid, if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to *Hopley*. There were two counts in the declaration: one for goods sold, the other against the defendant as endorser of the promissory note. When the cause came on to be tried, though both parties came to try the real merits of the question between them, viz: " Which should bear the loss of the note occasioned by *Hopley's* failure," and the plaintiff's agents had the note in court,

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(1) 1 Burr. 352.

yet finding upon their own evidence, that the plaintiff had given repeatedly further credit to Hopley, they resorted to a trick, and rested their case upon proving the sale and delivery of the goods, which never was disputed. The defendant could not produce the note; it was in the plaintiff's custody. Relying upon its being the only ground of the plaintiff's case, the defendant had not given him notice to produce it. The court having ruled it could not be given in evidence, and the defendant had not entitled himself to prove the contents for want of notice to produce it—Lord *Mansfield* told them it was an improper artifice; that no verdict could stand which was so obtained. But the plaintiff refused to produce the note; and had a verdict of course.

It was contended, for the plaintiff, that the verdict was regular, and the plaintiff in no fault; for without notice he was not obliged to produce the note. Therefore the verdict ought not to be set aside. But the court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience; that the rules of practice must be general; but he who abused them in a particular case, should not shelter a trick by regularity. The plaintiff did not want notice to produce a note he had in court, and which he had laid in the declaration as his ground of action. Besides, he took a verdict for the price of the goods, though he had received satisfaction, the evidence of which was in his own custody, and suppressed; and they not only set aside the verdict, but without costs, and declared the next time that a party should obtain a verdict in like manner, by an unfair, unconscionable advantage, without trying the real question, they would set aside the verdict, and make him pay the costs.

The same principle governed in granting the motion in *Bodington v. Harris*.<sup>(1)</sup> This was an action for a nui-

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(1) 1 Bing. 187.

sance, and was defended by the landlord of the defendant. The attorney of the landlord told the defendant he need not attend the trial ; and without the consent, and against the express directions of the defendant, he entered into a consent rule to abate the nuisance. The landlord being also dissatisfied dismissed the attorney, and told the defendant he must thenceforth employ an attorney for himself. An attachment having issued on the consent rule, a rule was obtained to show cause why the attachment should not be set aside, and a new trial had. The court thought there ought to be a new trial under all the circumstances, as it could form no precedent, except a case should arise precisely similar in all its points.

So, in *Trubody v. Brain*.<sup>(1)</sup> One Robert Brain was examined as a witness, who, on being asked if he had not had a conversation with Richard Haynes, the attorney of the plaintiff, on the subject, denied he ever had. Haynes being called on the part of the plaintiff, directly contradicted Brain, and swore to a conversation. Brain was committed for perjury, and Haynes directed to prosecute him, who next day stated to the judge he had mistaken the person of the witness, and Brain was discharged. Upon these grounds the defendant obtained a rule *nisi*. *Per Cur.*—“ We think this is a case which calls on us in making this rule absolute, also to furnish the wholesome example of ordering that the plaintiff's attorney shall pay the costs of the former trial.”

In the recent case of *Jackson v. Warford*,<sup>(2)</sup> where the silence of the plaintiff's attorney misled the defendant's counsel, the court appear to have decided on the same principle.

This was an action of ejectment, and verdict for the plaintiff. The defendant moved for a new trial, as well

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(1) 9 Price, 76.

(2) 7 Wendell, 62.

on account of the ruling of the judge, as on the ground of *surprise*, arising from the fact that the attorney for the plaintiff, on being called on to produce, in pursuance of a subpoena and notice, a deed of the premises in question from the wife of Constantine to Rouse, found by him among the papers of Rouse, and admitted by him after the commencement of the suit to be in his possession, stated that he had delivered the deed to a son-in-law of Rouse, who had sent it to counsel at Troy, but without apprizing the defendant's counsel. Upon this point the court remark—  
"There can be no question but that a new trial should be granted on the ground of surprise. From the conversations had with the plaintiff's attorney on the subject of a conveyance for lot No. 60., and from his silence as to the disposition he had made of it, the defendant and his counsel had every reason to suppose that the plaintiff's attorney had the deed in his possession and would produce it.

In *Niles v. Brackett*.<sup>(1)</sup> Assumpsit on the warranty of a horse, which died soon after it was purchased. The question at the trial, before *Parker*, Ch. J., was, whether the disease of which the horse died existed before the sale, or was acquired afterwards; and the chief justice stated, that the fact was rendered very doubtful by the testimony. One *Richardson* was offered as a witness by the defendant, and testified in the cause, which being so nicely balanced, the chief justice observed, his testimony was undoubtedly material. No objection was made when he was offered, but after the trial it appeared that he was one of the defendant's bail in this suit, which fact was not known to the plaintiff, or his counsel, until after the trial. On this ground a motion was made by the plaintiff for a new trial, a verdict having been obtained by the defendant. For the defendant it was contended, that the objection

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(1) 15 Mass. 378.



came too late, and that the defendant had been negligent. But a new trial was granted, it appearing that the interest of the witness was not known to the plaintiff until after the trial, and that it was known to the defendant, who produced him.

So, in *Hylliard v. Nickols*.<sup>(1)</sup> Petition for a new trial in an action brought by Hylliard against Nickols, upon the statute entitled an act to prevent the slave trade—alleging that said Nickols, at a certain time, had transported out of this state, into the state of Virginia, two negro children, contrary to the force and effects of said statute. And verdict for defendant. It further appeared, that to show he had carried the children with him as a part of his own family, he produced false depositions and documents. It was contended, for the defendant, that it was in the nature of a criminal prosecution, and a new trial could not be granted. But, *per Cur.*—"This is not a criminal prosecution, but a civil action, brought on a remedial statute to recover the penalty enacted, to prevent the exportation of persons of a certain description, out of this state into another state, for the purpose of selling them. But, was it a criminal prosecution, an acquittal obtained by forgery and perjury, by the procurement of the prisoner, would be set aside in favour of the public."

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(1) 2 Root, 176.

## CHAPTER IV.

### FOR MISCONDUCT OF THE JURY.

If there be any one right we value more than another, it is trial by jury. It is thus emphatically provided for in our bill of rights ;—" The trial by jury in all cases, in which it has heretofore been used, is to remain inviolate forever."<sup>(1)</sup> It is also secured to the citizens generally, in criminal cases, by article 6th ;<sup>(2)</sup> and by article 7th of the constitution of the United States, " in suits at common law, where the value in controversy shall exceed \$20."<sup>(3)</sup> It is of the utmost importance that so valuable an institution, to which is committed the life, liberty and property of every citizen, should be not only preserved, but preserved in purity, uninfluenced by ignorance, caprice, popular excitement, fear or favour.

To provide against every contingency tending to affect a right so sacred, and to secure an intelligent and impartial verdict, the jurors are to be selected from among persons of property and integrity, drawn, summoned and returned by forms as unexceptionable as the collected wisdom of ages has been able to devise. When convened, they are again to be drawn, called, sworn and empannelled in the presence of the court, the counsel, the parties, and the public. By all these forms and solemnities, they are separated from their fellow citizens, placed under the direction of the judges, their constitutional advisers, and

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(1) 1 R. S. 93. § 2.

(2) *Ibid.* § 21.

(3) *Ibid.* § 22.

clothed for the time being with high judicial powers. In their presence, witnesses detail the facts, counsel sift the testimony, and the court recapitulate and distribute it, applying the principles of law. No freedom with the panel is permitted ; the avenues to the jury box are shut against intrusion, and attempts to influence them, by excited litigants, prohibited under the severest penalties. When they retire in charge of the case, the vigilance of justice is redoubled ; and with such mysterious reverence does the law regard their decision, calling it, by way of eminence, the verdict, (*verdictum*), that it will not permit it to be impugned by themselves on any terms, nor by others upon slight pretences. For it is considered more conducive to public justice that the mistakes, or even turpitude of the jury should remain undiscovered, and slight defects overlooked, than that a door should be opened to tampering, or their decisions be jeopardized, by allowing jurors to become their own accusers. Still, however, the injustice they may occasion is not without remedy. In most cases, where the interposition of the law is required to correct their misconduct, it can be done by an appeal to the discretion of the court upon a given statement of facts ; and it may be regarded as a general rule that, wherever the misconduct of the jury has resulted to the injury of a party, relief will be granted directing a new trial.<sup>(1)</sup>

The duty of the jurors, being empannelled, is to listen impartially to, and carefully to weigh, the evidence ; to avoid all intercourse with the parties, their counsel, and even strangers, on the subject they are sworn to decide ; not to separate, unless by permission of the court and consent of parties, while the trial is in progress ; to take the law from the court, and after the testimony is concluded, and they are charged with the cause, to retire to some convenient

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(1) 1 Chit. Archb. 256. Gra. Prac. 272—274.

place, and there to confine themselves to the evidence submitted to them in the presence of the court; to admit neither persons nor papers to their retirement; neither to eat nor drink, at least at the expense of either party, nor to disperse until they have agreed upon their verdict, or be discharged by order of the court.

If, in any of these particulars, they wilfully violate the law, especially if abuse ensues upon their misconduct, it will subject them to punishment as for a misdemeanor, and in many instances will also vitiate their verdict.

1. If, at any time intermediate the opening of the cause and their rendering of the verdict, the jurors suffer themselves to be approached and laboured by the parties or their agents, and find for that party, their verdict will be set aside.

The rule is thus put, by way of example, by Lord *Hale*: "If the prevailing party, or any in his behalf, say to a jurymen after his departure from the bar, and before verdict given, the case is clear for the plaintiff, this will avoid the verdict if given for the plaintiff, for it is new evidence. But not if, after the jury are sworn, he speaks with a jurymen, but nothing touching the business in issue; this doth not avoid the verdict given after for him."<sup>(1)</sup>

We have seen in *Metcalf's* case,<sup>(2)</sup> that when the jury examined a witness *ex parte*, although to the same matter he had testified in court, the verdict was set aside, and a *venire de novo* awarded.<sup>(3)</sup>

So, in *Jennings v. Warne*. Motion for a new trial, because one of the jurors, after they retired, came from his fellows and spoke to the attorney of the other side, and received a bundle of papers from him which he carried to

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(1) 2 Hale's P. C. 308.

(2) Cro. Eliz. 189.

(3) Et vide 2 Bay, 94.

the rest. It was pretended it was no more than a map of the premises which the judge had held in his hand at the trial. But, per *Hardwicke*, Ch. J., "It will depend only on this, whether it was delivered to the jury by the consent of both parties, for if that appeared, it would prevent the parties alleging any thing against it; but as no such consent appears here, the verdict must be set aside."<sup>(1)</sup>

The same rule prevails in *Massachusetts*. In *Knight v. Inhabitants of Freeport*,<sup>(2)</sup> a new trial was granted, because the plaintiff's son-in-law said to one of the jurors, that the cause was of great consequence to him; that he should have to pay the costs if the cause should go against the plaintiff, and that the defence of the action was a spiteful thing on the part of the defendants.

So, in *Connecticut*, in *Bennett v. Howard*, in Error.<sup>(3)</sup> Action on the case, and verdict for plaintiff. Defendant moved in arrest of judgment, and showed for cause, among other things, for that one of the jurors empannelled in the cause, and who joined in the verdict, freely conversed about the case, while it was on trial, with other persons not of the jury, publicly declaring that the defendant's conduct could not be justified; and gave his opinion in favour of the plaintiff, before the testimony had been received and the cause argued. Upon which the court remarks: "The oath of jurors obliges them to speak nothing to any one concerning the matters they have in hand, but among themselves, nor suffer any one to speak to them about the same, but in court, until the verdict is delivered up in court. In this case, the court below found that one of the jurors conversed freely with persons not of the jury about the case, while it was on trial. This was directly contrary to his oath. To suffer such practice to obtain, would be

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(1) Lee's Rep. Temp. Hard. 116.

(2) 13 Mass. Rep. 218.

(3) 3 Day, 223.

of very dangerous tendency by opening the way to corrupt the streams of justice, and would destroy all confidence in the trial by jury."

In *New-Hampshire*, where, after a cause opened to the jury, one of the parties made statements to a juror, out of court, favourable to his own cause, and the jury found a verdict accordingly, it was set aside.(1)

So, in *Pennsylvania*, in *Brunson v. Graham*.(2) Case, for non-performance of a contract respecting the transfer of stock, and a verdict for the plaintiff. A rule was obtained to show cause why the verdict should not be set aside and a new trial granted, which rule was now made absolute by consent, without argument. It was admitted, that the jury retired from the bar, and conferred together for some time without coming to a decision, and then broke up late at night. Next morning, one of the jurors applied to a broker for information, respecting the price of certificates at a particular period, and having obtained the intelligence he wanted, communicated the same to his fellow jurors. A *venire facias de novo* was awarded.

And in *Bradley v. Bradley*,(3) in ejectment, a new trial was granted on a similar principle, for the singular reason that some of the jurors gave testimony to the rest after they retired. In proving title the principle question agitated in court was, whether the deed for life was genuine? But when the jury withdrew, two of them testified to their brethren, that although the defendant had bought the land, yet the bonds which she gave for the purchase money were unpaid when she married with the testator, and that the testator had been obliged to discharge them. On this representation, several of the jury, who were before in favour of the defendant's title, concurred in finding a verdict for

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(1) *Perkins v. Knight*, 2 N. H. Rep. 474.

(2) 2 Yeates, 166.

(3) 4 Dall. 112.

the plaintiff. On arguing the motion for a new trial, the defendant produced the depositions of two of the jurors, setting forth that after the jury had withdrawn, two other jurors had affirmed certain matters of fact, which had induced the deponents to find a verdict for the plaintiff; and also the depositions, of two witnesses, contradicting the facts that had been so affirmed. The plaintiff produced the depositions of six of the jurors, explaining their conduct, and averring that the whole twelve were of opinion, that another deed conveying the premises in fee had been executed. In granting the motion, the court took no notice of a point that seems to have been made by the counsel, as to the admissibility of the depositions of the jurors, to establish the misconduct of the jury, but without hesitation made the rule absolute.

No case precisely in point appears to have occurred in our own courts, of an attempt to labour the jury. But there can be little doubt, should such a case occur, it would meet with a similar treatment, although it is probable that the question of a new trial in such a case, would be disposed of, rather as a question of judicial discretion, than of strict law or right. The law of the state against *embracery*,<sup>(1)</sup> which is sufficiently severe, shows with what jealousy all attempts upon jurors is to be regarded; but whether in any given case it would avoid the verdict, would probably depend on the abuse presumed, or proved to have followed, and the substantial justice of the case.

2. If the jurors receive papers not submitted, or partially submitted in evidence, the verdict will be set aside, if found for the party committing the irregularity. The rule is thus put:

If the party deliver a scroll to a juror, in proof of what he afterwards attempts to establish at the trial, and the juror shows it to his fellows, and they find for the party

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(1) 2 R. S. 683, and see 5 Cowen, 503,

who delivered it, it will avoid the verdict.(1) But not if the juror have a piece of evidence in his pocket, and after the jury are sworn and gone together, he showeth it to them; this is a misdemeanor, fineable in the jury, but it avoids not the verdict, though the facts appear upon examination.(2)

If this mean any thing more than, that facts or papers in the knowledge or possession of jurors, may be referred to in illustration of the evidence given at the trial, it is presumed it would not be law at this day. By no rule of modern practice can any evidence, material to the issue, be legally noticed by the jury, unless first submitted to them in the presence of the court. This is well illustrated in a recent case, *The King v. Sutton*,(3) for a seditious libel, tending to instigate public outrages. The king's proclamation and the preamble to two acts of parliament, were offered in evidence and objected to, but admitted, and the defendant was convicted. A new trial was moved for, on the ground that improper evidence was admitted, for deficiency of proof, and because the judge had misdirected the jury, in stating to them, they were at liberty to refer to their own personal knowledge, if they saw any of the outrages committed; which doctrine, it was contended, was exploded.

The case was elaborately argued by eminent counsel, and the judges delivered their opinions *seriatim*. The charge of the judge at the trial, as to the use to be made by the jurors of their *personal* knowledge, is commented on with great clearness, and presented in its true point of view, by Lord *Ellenborough*: "If, in this case," says he, "I had been able to detect any particle of proof that ought not to have been offered to the consideration of the jury, I should have thought such vicious proof would have cor-

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(1) Bro. Abr. Judgment, pl. 143.

(2) 3 Hale's P. C. 306.

(3) 4 Maule & Sel. 532.



rupted the verdict, and avoided it. But after the utmost attention, I am unable to discover that there is any vice in any particle of this evidence. The material objection upon which the rule was obtained, was founded upon a supposed misdirection of the learned judge at the trial, viz : that he had referred, in aid of some defect of evidence, to the personal knowledge which the jurors might possess, for proof of the fact that outrages had been committed in Nottingham ; for, as to their having been committed in the neighborhood of Nottingham, I do not think that it is material to prove both. It now appears, however, from the report, that the judge did not lay any stress on the personal knowledge which the jury might be supposed to possess, in order to aid any defect of evidence. On the contrary, it appears that he considered the evidence as fully sufficient to establish a verdict in favour of the crown ; only he made the observation with reference to what they knew as a matter of illustration, that it formed a part of the history of the county, that such outrages had been committed ; as if he had said, every one must be aware of what has passed before their own eyes, and at their own doors ; but he did not advise them to rely on that as a source of information on which they were to found their verdict, but only that it might make the proof more satisfactory to their minds, if they knew what had passed, because no one can have any reason to doubt what he knows and sees. It is conclusive, I think, upon the report, that the judge did not leave this to the jury as forming a branch of evidence of itself."

A case in Virginia, *Price v. Warren*,<sup>(1)</sup> will further illustrate the only justifiable use to which the jurors may put their personal knowledge, and how far the court will indulge them in mixing it with the testimony adduced in

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(1) 1 Hen. & Munf. 385.

open court. It was an action on a bond due more than twenty years, and the presumption of payment was relied on. A verdict being found for the plaintiff, the defendant moved for a new trial, stating that two jurymen had declared that one of their own body, who was not examined, said in the jury room, that he knew the testator of the defendant, and that he was so accurate a man in his affairs, that he would have taken a receipt on the bond, if it had been paid; and the said two jurors had further declared that this circumstance alone influenced them to find for the plaintiff. The plaintiff's counsel admitted these matters in like manner as if proved by affidavits of the two jurymen. But the court below overruled the motion for a new trial, on the ground that it would be dangerous to grant a new trial on such information from the jurymen, and that the new trial would have been against the justice of the case. In the court of appeals, the judgment was affirmed.

So, in *Purinton v. Humphreys*,<sup>(1)</sup> where the jury, after they retired to deliberate on a cause, received and were influenced by the declarations of one of their fellows, discrediting a material witness of the plaintiff, it was held to be no good cause to set aside the verdict.

But it would be otherwise, if the statements made by the juror to his fellows were material to the issue. As in *Talmadge v. Northrop*.<sup>(2)</sup> Action in deceit. Plea, not guilty, and verdict for defendant. Motion in arrest of judgment; that one *Patterson*, a juror, gave evidence to his fellows, while they had the cause under consideration, which was not given in court, viz.: that he was coming through Warren, the place where the horses were sold, when Talmadge, the defendant, and his brother, were selling them to the defendant's partner, Bishop, and he

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(1) 6 Greenl. 379.

(2) 1 Root, 522.

wondered that Talmadge trusted him, as he lived within six miles of him, and must have known his circumstances. And also, for that said Patterson would not trust said Bishop himself. The court inquired of the jury, and found the facts alleged in the motion to be true ; and the verdict was set aside, and the cause continued for another trial.

The rule is thus laid down by *Coke* : " If the plaintiff, after evidence given, and the jury have departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury, concerning the matter in issue, or any evidence, or any escrowle, touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, *et sic é converso*." (1) Accordingly, it has been held, if the jurors send for a book after departure from the bar, and read it, the verdict is void. (2)

In conformity with the spirit of this rule the court, in a recent case, *Burrows v. Unwin*, (3) refused to send the jury a book, although the counsel on both sides consented. Action on the case, for negligence of the defendant's servant. Lord *Tenterden*, Ch. J., had summed up the evidence, and the jury had retired, when they sent a message to his lordship, desiring to have "*Selwyn's Law of Nisi Prius*" sent them from the library of the court. Lord *Tenterden* asked the counsel on both sides, if they objected to its being sent, and they answered that they had no objection. However his lordship observed, " The regular way is for the jury to come into court and state their question, and receive the law from the court ; and for the sake of precedent, that course should be adopted now."

So, if after the evidence given, where divers papers are read on both sides, and the clerk is making up his bundle

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(1) Co. Litt. 227.

(2) Vin Abq. Trial, pl. 18.

(3) 3 Carr. & Payne, 310.

of papers, that were under seal, to deliver to the jury, the solicitor for the plaintiffs deliver a bundle of depositions to the jury, some whereof were read, and some not read, and upon examination this appeared, though the jury swore they opened not the bundle delivered by the solicitor; yet the verdict for the plaintiff was for this cause avoided, and a *venire facias* awarded, for great inconvenience may be by such a practice. And the oath of the jury, that they never looked into them was not regarded, for possibly it may be a misdemeanor in them to look into them, which they shall not excuse in this manner.(1)

So, in *Massachusetts*, where a paper not read in evidence had been given to the jury by mistake, a new trial was granted. On examining the paper, it appeared to the court to furnish material evidence in favour of the party prevailing. But he moved the court to examine some of the jurors to prove, that they were not influenced by it in finding their verdict. The other party had also summoned other jurors to prove the influence. The court refused to examine any of the jurors, and observed, that the court must be governed by the tendency of the paper apparent from the face of it; that it was not pretended that the jury had not read it, and it would be difficult for jurors, where, as in this case, there was much evidence of different kinds, clearly to decide in what manner their minds were influenced in forming their verdict. As it was received by the jury among other written evidence, and read by them, it must be presumed that they considered it as evidence, and gave due weight to it.(2)

But in a subsequent case, *Hix v. Drury*,(3) a new trial was refused by the same court, and the jurors permitted to

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(1) 2 Hale's P. C. 308.

(2) *Whitney v. Whitman*, 5 Mass. Rep. 405.

(3) 5 Pick. 296.

explain, under circumstances very similar to those, of the case last cited. Case for slanderous words. It appeared, after the jury had returned a verdict for the plaintiff, that two depositions, which had not been read on the trial, were put up with the other papers and delivered to the jury, and were returned by them with their verdict. It did not appear by whom these depositions were put up; the irregularity was entirely accidental. The question being put to the jury, whether these depositions were read by any of them, they retired to inquire of each other, and on their return, the foreman stated that none of the jury had any distinct recollection, that either of the depositions had been read by them, but they recollected that part of one of them had been read in court. On the next day, some of the jury having suggested that the answer of the foreman was not sufficiently explicit, the question was again put to him, and he stated that the jury had intended to answer, that they were satisfied that neither of the depositions was read by them in their room. They were then asked if they all agreed in that answer, and they assented. Upon this the court observes: "It appears that the two depositions went to the jury by accident. We think it is sufficiently proved that they were not read, and that although the eleven jurors were not sworn to testify, yet, that by their oath to give a true verdict, they were as much bound to make true answers in court, touching their verdict, as if they had been sworn specifically for that purpose. These papers then having gone to the jury by accident, and not having been read by them, the question is, whether there shall be a new trial. We are all of opinion, that if a paper not in evidence is delivered to the jury by design, by the party in whose favour the verdict is returned, the verdict shall be set aside, even if the paper is immaterial; and this is a proper punishment for the party's misconduct. But that is not the present case. So where a paper is capable of influencing the jury on the side of the prevailing party, goes to the jury by

accident, and is read by them, the verdict will be set aside, although the jury may think that they were not influenced by such paper, for it is impossible for them to say what effect it may have had on their minds. But where a paper which might influence the jury is not read, it is the same thing as if it had not been delivered to them. The verdict, therefore, is not liable to objection on this ground."

This, and the former case, do not differ in the principle, that the jury are not to read a paper not submitted in evidence, but simply in the mode of the court's arriving at a knowledge of the fact. In the one case, it is ascertained from the jury, that the depositions were not used; in the other, no inquiry appears to have been made, and in the absence of proof, the court presume, as they had a right to do, that the jury used the papers.

It is proper to observe, that the mode adopted by the court, in the last cited case, to possess themselves of the fact by examining the jury in open court, is more conformable to the ancient practice, and it may be added more satisfactory, and much less liable to abuse than proceeding by affidavit. The rule is thus expressed by Lord *Hale*.—"If, after the jury sworn, either party deliver a piece of evidence to the jury, and the verdict is given for him that delivered it, it shall avoid the verdict; but then this must appear by examination, and be endorsed upon the *postea* or verdict, so as it appears of record, and it must not be barely by affidavit made after."<sup>(1)</sup> The modern practice generally is to read affidavits on the motion.

3. It would appear to follow, as a necessary inference, that if the jury take out papers by mistake, but do not read them, and to that they may be examined, the verdict would not be disturbed.

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(1) 2 *Hale's P. C.* 307.

With this agrees *Hackley v. Hastie*.<sup>(1)</sup> The defendants moved to set aside the verdict given for the plaintiff in this cause, for irregularity. They read an affidavit stating that at the trial of the cause, the jury, when they went out to consider of their verdict, took with them a commission for the examination of certain witnesses, with the interrogatories and depositions annexed, a paper attached to which had been read in evidence on the trial of the cause, and that no consent of the counsel was given for the purpose. For the plaintiff were read the affidavits of three of the jurors, who tried the cause, that the papers mentioned were not read by the jury. *Per Curiam*.—"The decisions on this subject to be found in the books are contradictory. Some of the ancient cases are very strict, but of late years courts have been inclined to be less rigid, and to decide according to the real justice of the case. If the jury have never looked at the papers, nor have been influenced by them, there can be no just cause for setting aside the verdict."

In *Pennsylvania*, the same rule, as to jurors carrying off papers without permission, has been adopted. In *Sheaff v. Gray*,<sup>(2)</sup> there was a verdict for plaintiff, and on a rule to show cause, it appeared that a paper was delivered to the jury, containing an account of expenditures respecting a house built on the lands of the defendant, *said to be with the knowledge of the defendant*, referring to the bankrupt's books and their several pages, without the consent of the adverse counsel. The books were not delivered to the jury, and the account given to them varied from that before furnished to the defendant. For the plaintiff, it was contended that the paper was a mere estimate, and shown to the jury by way of calculation, and therefore immaterial. But, *By the Court*.—"This paper cannot be called an

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(1) 3 Johns. Rep. 252.

(2) 2 Yeates, 273.

estimate or calculation. It goes to substantiate the demand of the plaintiffs. It is a dangerous precedent, and may lead to ill consequences, though we do not suppose there was any intention here of doing wrong. All the cases agree that a party delivering papers to the jury without consent or the leave of the court, a new trial shall be granted. We know not what effect this paper may have produced in the minds of the jury; but we well know they should not have had it delivered to them. Solely on this ground, and without expressing our sentiments as to the merits of the case, a new trial is awarded."

So rigidly is the rule adhered to in Massachusetts, as to have been held, in a recent decision, that a correspondence of the jury with the judge, after they retire from the bar, will void the verdict, as in *Sergeant v. Roberts*.<sup>(1)</sup> The trial of this action lasted three days. After the jury had been out six hours, the foreman wrote to the judge at chambers, that they could not agree, and that they waited for his directions. The judge returned an answer in writing, saying, that he was unwilling, after so much time had been consumed in the cause, to permit them to separate, and giving such directions, as would enable them to consider the cause in a more systematic manner. He added, that the officer had directions to take them to a more convenient apartment, if they desired it. The judge also directed the jury to bring his letter into court with them, in order that it might be filed with the papers in the case. After this they agreed upon a verdict in favour of the defendants, and the plaintiff moved for a new trial, among other reasons, because of this communication from the judge to the jury. *Parker*, Ch. J., delivered the opinion of the court, and after observing at large upon numerous instances of a similar nature, amounting almost to the set-

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(1) 1 Pick. 337.



tioned practice of the court, concludes, " We are all of opinion, after considering the question maturely, that no communication whatever, ought to take place, between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and where practicable, in presence of the counsel in the cause. The oath administered to the officer seems to indicate this as the proper course. He is to suffer no person to speak to them, nor to speak to them himself, unless to ask them whether they are agreed; and he is not to suffer them to separate until they are agreed, unless by order of the court. When the court is adjourned, the judge carries no power with him to his lodgings, and has no more authority over the jury than any other person; and any direction to them from him, either verbal or in writing, is improper. It is not sufficient to say, that this power is in hands highly responsible for the proper exercise of it. The only sure way to prevent all jealousies and suspicions, is to consider the judge as having no control whatever over the case, except in open court, in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of, or suspect, in the administration of justice, and the convenience of jurors is of small consideration, compared with this great object.—It is better that every body should suffer inconvenience, than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness and jealousy."(1)

4. But however irregular it may be in the jury to carry away papers without consent of counsel under the direction of the court, yet if not furnished by the prevailing party, and wholly immaterial to the issue, it will not avoid a verdict, in other respects regular.

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(1) Vide 6 Green. 141.

Thus, in *Vicary v. Farthing*, (1) the parties were at issue, and at the trial, to prove the nonage of the plaintiff, a church book was given in evidence. After the jury's departure from the bar, and before they had agreed upon their verdict, the plaintiff's solicitor delivered to the jurors the said church book, and afterwards they found for the plaintiff. All this matter was returned upon the *postea*; and for this cause it was moved that judgment should be stayed, and in proof thereof *Metcalf's* case was cited. (2) *Wiatt, J.*, said, that it had been ruled in one *Pickering's* case, where letters patent were given in evidence to the jury, while they were conferring upon their verdict, by the plaintiff, without the court's direction, delivered them the said letters patent, that judgment should be stayed upon the verdict. *Gawdy* and *Popham* denied that case; and a distinction was taken between writings and parol proof, but chiefly it was urged it would be mischievous to the party for whom a verdict passed, if the delivery of evidence by the contrary party, or, peradventure, by a stranger without his privity, should stay his judgment. But *Fenner, e contra*, objected, because there might be some matter in this book to induce them otherwise than they intended before; and because it was delivered on his part for whom the verdict passed. Wherefore it was adjourned; but afterwards, the fact appearing to be immaterial, it was adjudged for the plaintiff.

So, in *Rex v. Burdett*. (3) Information was brought against Burdett, farmer of Newgate market, for extortion; and the extortion was assigned, for that he had taken divers sums of money of the market people for rent, for the use of the little stalls in the market, and divers great sums for fines. At *nisi prius*, upon the general issue pleaded, the

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(1) Cro. Eliz. 411.

(2) Ante, p. 48.

(3) 1 Lord Raym. 148.

defendant was found guilty, It was moved to set aside the verdict. And one of the irregularities assigned was, that the jury took with them out of court an order of the common council, without the leave of the court, or consent of the parties. And they cited the case of *Lady Joy*, where a verdict was set aside, because the jury took with them a map of the premises out of court. But as to this point he said, that it was irregular to take the act of the common council; but the matter of the act being evidence on both sides, it would not set aside the verdict.

So, in a recent case in *Pennsylvania, Lonsdale v. Brown*.<sup>(1)</sup> A new trial was moved for, because the jury took out with them a deposition, part of which was objected to and overruled at the trial. The court put their denial of the motion, as to this point, upon the ground that the parts of the deposition that had been overruled by the judge, and read by the jury, were altogether irrelevant and immaterial to the issue.

A distinction has been taken between sealed and unsealed papers. The former, it has been held, the jury may have, by permission of the court, but not the latter, except by consent. Yet, should the jury violate the rule in either, or even in both instances, it would not avoid the verdict. It is thus laid down by Judge *Buller*—"The jury, after going out of court, shall have no evidence with them, but what was shown to the court as evidence, nor that without the direction of the court. The court may permit them to take with them letters patent, and deeds under seal, and the exemplification of witnesses in chancery, if dead; but not a writing without seal, unless by consent of parties. But though the jury take with them patents, deeds, &c., without leave of the court, or writings without seal, books, &c. without consent of court or party, it shall not avoid

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(1) 4 Wash. C. C. Rep. 148.

the verdict, though they be taken by the delivery of the party for whom the verdict was given.”(1)

If the distinction between writings with and without seal ever existed in this country, it has been long since exploded. Yet in a late case in Pennsylvania, *Alexander v. Jamieson*, (2) it was put forward, ineffectually to be sure, as the only cause for reversing a judgment. The reasons for the distinction originally, and its inapplicability to modern times, and especially to the tribunals of these United States, are contained in the very learned decision of the court, delivered by *Tilghman*, Ch. J.—This was an issue directed to try who were the heirs of a certain John Alexander. The defendant gave in evidence a manuscript book found in the trunk of the said Alexander, after his death. When the jury were about to retire, the counsel for the plaintiffs objected to their being permitted to carry this book out with them; but the court were of opinion that the jury should have it, to which opinion an exception was taken, upon which the chief justice observes: “It is no longer a question whether the book was legal evidence; but the naked point is, whether, having been given in evidence, the court might permit the jury to take it out with them. It is undoubtedly laid down as a principle, in some of the English cases, that the jury are to take no papers not under seal, without the consent of both parties; yet the same cases say, that if the court permit them to be taken, it shall be no cause for setting aside the verdict. We are somewhat in the dark as to the reason of this distinction between sealed and unsealed writings, but it is certain that it originated under circumstances not applicable to the present times. The best account of it is to be found in the writings of Lord Hale and Lord Gilbert. They say that in ancient times, men of rank and property had

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(1) Bull. N. P. 308.

(2) 5 Binn. 238.

seals, by which their families were distinguished. Those were not numerous ; and as causes were tried by men in the neighbourhood, it was supposed that the seals were so notorious, as to be well known to the jury. Papers under seal therefore, carried their own evidence along with them ; and, indeed, it is probable, that in many instances it was thought sufficient to affix a seal without any subscribing evidence, so that the instrument was affixed to the seal alone. But the notoriety of seals has long ceased. Every man now takes what seal he pleases.—It does not appear that the point has been brought before any court for the last half century, during which period, the commerce of the world has been prodigiously enlarged, and commercial people make very little use of seals in their transactions. I have never known this question expressly decided in Pennsylvania ; but I take it, that in practice the English rule has not been extended here.”

In the state of *New-York* the practice is, not to allow the jurors to have the papers produced in evidence, without the consent of parties. Yet there appears to be no good reason why the judge at the trial should not exercise his discretion in giving or withholding the papers, as may best promote the ends of justice. And should he exercise such a discretion, and an exception be taken, there is little doubt, that, following up the intimation in *Hackley v. Hastie*,<sup>(1)</sup> the court would meet the question upon the ground of sound discretion, rather than of strict right.

5. It was formerly held that if the jury separated, after being charged with the case, and before they rendered their verdict, except by permission of the court and consent of parties, or from necessity, it avoided their verdict ; but the modern rule is different.

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(1) 3 Johns. Rep. 252.

The nature, duration and privations of the confinement of the jury, after they retire, are thus stated by Lord Coke : "By the law of England, a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed. After they be agreed, they may, in causes between party and party, give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drink, and the next morning, in open court, they may either affirm or alter their privy verdict, and that which is given in court shall stand. But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court." (1)

In the *Earl of Kent's* case, (2) the jury being sworn at the bar, retired to the open street, and there came such a tempest, that some of the jury departed without leave of the justices. One of the jurors came into a house, where he was cautioned by divers persons to take care what he did, for the matter was better for the Earl of Kent than for the bishop, and was asked to drink, and did drink. And after the storm ceased, the jurors rejoined each other, and found for the bishop. The Earl of Kent had the whole matter certified to the court. The point of the jury's dispersion, was argued and re-argued in the exchequer chamber, and after much deliberation, the court stood six to four, sustaining the verdict. Upon a like principle of necessity, it has been gravely held, what would not in modern practice bear to be disputed, that a separation of the jury by reason of a sudden affray, fire, or a house about to fall, and the like, would not avoid the verdict, nor would the jury be amerced. (3)

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(1) Co. Litt. 227.

(2) Bro. Ab. Verdict, pl. 19.

(3) Bro. Ab. Verdict, pl. 19. Com. Dig. Enquest. F.

The modern practice in England is to permit the jury to separate, even in criminal cases in the discretion of the judge; and where there is no ground to suspect they have been practised upon during the interval of their dispersion, it will not vitiate their verdict. This has been so recently and so fully illustrated in the case of *The King v. Woolf and others*,<sup>(1)</sup> as to settle the practice on this point, if any doubt existed before.

The defendants were indicted for a conspiracy to obtain goods by undue means. At the trial before *Abbott, Ch. J.*, the defendants, *Mozely, Woolf, Levy*, and *Kinnear*, were found guilty. They moved for a rule to show cause why the verdict should not be set aside, on the ground that the finding of the jury was void, the jury having dispersed, during the interval of an adjournment, before they delivered their verdict. The affidavits, in support of this motion, stated in substance, that the trial had lasted two days; that in the morning the trial commenced, and about 11 o'clock at night, the case being then unfinished, the court adjourned until the following morning; and the jury separated and retired to their respective homes. The next morning they assembled again, and the case being concluded at a late hour in the afternoon of that day, they found the defendants guilty. The defendants and their attorneys were wholly ignorant of the fact of the jury having separated, until after they had found their verdict. The judges delivered their opinions *seriatim*; but that of *Abbott, Ch. J.* will sufficiently illustrate the modern rule.—“I am of opinion that there is no sufficient foundation for the present application. The application is grounded upon the suggestion of these two facts: *First*, that the jury had dispersed during the night. *Secondly*, that that fact was not known to the defendants until after the trial was over. Now the trial

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(1) 1 Chitty's Rep. 401.

began between nine and ten in the morning ; it had proceeded until eleven o'clock at night or later, before the evidence on the part of the prosecution was closed. Learned counsel were employed separately for several defendants. It must be assumed, that in that stage of the case, evidence would be laid before the jury on the part of the defendants. It became matter, therefore, of necessity, that the trial should be adjourned, and an adjournment accordingly took place from the necessity of the case, the jury being fatigued both in mind and body ; and it would have been most injurious to the case of the defendants, even if the judge and jury had had strength enough to go on, till the trial came to a close ; I say most injurious to the case of the defendants, if their case was heard by persons whose minds were exhausted with fatigue, as it would have been, if an adjournment had not taken place. An adjournment of this nature is not necessarily followed by the dispersion of the jury, for in many cases, they are kept together till the final close of the trial. But I am of opinion, that in a case of misdemeanor, their dispersion does not vitiate the verdict ; and I found my opinion upon the admitted fact, that there are many instances, of late years, in which juries upon trials for misdemeanors, have dispersed and gone to their abodes during the night for which the adjournment took place, and I consider every instance in which that has been done, to be proof that it may be lawfully done. It is said, that in some of those instances, the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion, that that can make no difference. I think the consent of the defendant in such case ought not to be asked ; and my reason for thinking so is, that if that question is put to him, he cannot be supposed to exercise a fair choice in the answer he gives, for it must be supposed that he will not oppose any obstacle to it ; for if he refuses to accede to such an accommodation, it will excite that



feeling against him which every person standing in the situation of a defendant would wish to avoid. I am also of opinion, that the consent of the judge would not make, in such case, that lawful, which was unlawful in itself; for if the law requires, that the jury shall at all events be kept together, until the close of a trial for misdemeanor, it does not appear to me, that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the judge, as it seems to me, is this, that if it be done without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation. But, though it may be a misdemeanor in them to separate without his consent, it will not avoid the verdict, in a case of this kind, as it would, if the law required the jury to be absolutely kept together.—It seems to me, that the law has vested in the judge the discretion of saying, whether or not, in any particular case, it may be allowed to the jury to go to their own homes, during a necessary adjournment throughout the night.—For these reasons it appears to me that there is no ground for the present application, and I conceive, we ought not to give any reason to suppose that any doubt exists, when none really exists in our minds.”

No case precisely in point has occurred, defining the power of the judge at the trial, and settling the American practice on the subject of the separation of jurors, at least in criminal cases. The uniform practice it is believed in this country is, not to permit the jury to separate in any stage of the progress of a criminal suit, after the case is given them in charge by the court, without consent of counsel. But there is little doubt, should the question arise upon a similar state of facts, as in the *King v. Woolf*, the

decision would be similar. In a late case from Massachusetts, where the judge authorized the jury, without consent of counsel, to separate, after they should agree upon their verdict, and to return and render it at the opening of the court, it was held, upon motion to set aside the verdict, that it was not vitiated by the separation of the jury.(1)

It was early held, that if the jury separated from inadvertence, and no abuse followed, although punishable by fine, it would not avoid the verdict. Thus, in *Lord St. John v. Abbott*.(2) After the evidence was summed up in the forenoon, the jury retired to consider of their verdict. Before the rising of the court they came into court, attended by the bailiff, to ask a question, which was answered, and they were sent back. At the sitting of the court in the afternoon, the judge was informed, that some of the jurymen were in court; whereupon, being asked by him what they did there, answered they could not agree, and were thereupon sent back to their fellows, and afterwards a verdict was brought in for plaintiff. The judge did not certify the verdict to be contrary to evidence. The court was of opinion, that this was a misbehaviour in the jury, for which they were fineable; but not a sufficient cause to set aside the verdict.

6. Upon this point the practice in this country appears to have resolved itself into the exercise of a judicial discretion, confining the motion for a new trial to the question of abuse, and invariably denying the application, where no injury has ensued.

Thus, in *Smith v. Thompson*.(3) Motion to set aside the verdict, for irregularity in the conduct of the jury. After they had retired, and remained from 6 P. M. to 3 A. M.

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(1) *Winslow v. Draper*, 8 Pick. 170.

(2) *Barnes*, 441.

(3) 1 Cowen, 221.

without being able to agree on their verdict, two of the jurors, eluding the care of the constable, left the jury room, and one of them remained at a neighboring tavern during the night ; the other went to his own house, which was near by, ate his supper there, and staid all night. Both jurors returned, however, and the whole were together and went into court the next morning. They informed the court that they had not agreed, stated the point to the court wherein they differed, took their advice, retired, and found a verdict for the plaintiff. No improper communication with the jury appeared ; and no probability that their absence had produced any effect upon their minds, in making up their verdict. *Per Curiam*—"It was clearly irregular in the two jurors to separate from their fellows. But this does not affect the merits of the case, as between the parties. The ancient strictness, in relation to the conduct of jurors, is somewhat relaxed. Whether the verdict is to be set aside, must depend upon circumstances, and the real justice of the case. If there is a probability of abuse, we then notice it ; but here is none."

So, in *Horton v. Horton*.(1) Motion for a new trial, on the ground of the misconduct of the jury, who agreed upon their verdict while the court were at dinner, and without the consent or knowledge of either party, dispersed, and obtained their own dinners, and returned into court at the opening thereof in the afternoon. Against the motion, it was contended, that though the dispersion of the jury may be a contempt of court, for which the jury are punishable, it is not such an irregularity as to avoid the verdict, and of this opinion were the court, adding, that if the slightest suspicion had appeared that the privilege which the jury had taken had been abused, to the injury of the party, the verdict should be set aside.

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(1) 2 Cowen, 589.

So, in *Ex parte Hill*,<sup>(1)</sup> a *mandamus* was granted to vacate a rule, setting aside a verdict for irregularity in an action between Hill, plaintiff, and one Clark, defendant. The verdict was for Hill; and the court below set it aside on Clark's motion, because one of the jurors, during the trial, left the box without permission of the parties or the court, went out of doors, and was absent some minutes, returned and took his seat, and joined in the verdict against the defendant. Neither of the parties knew of his absence till he had been gone some time; but no testimony was given to the jury while he was gone; and he spoke with no one except to tell the constable, who came after him and brought him back, that he was one of the jury. *Per Curiam*.—"It is the settled doctrine, that though such conduct as this is a contempt of the court, yet it is not a ground for avoiding the verdict."

In *Connecticut*, a statutory provision on the subject, couched in strong terms, apparently prohibiting, under any circumstances, the separation of the jury, has received a construction conformable to the general practice. In *The State v. Babcock*,<sup>(2)</sup> in error, where the jury had separated before they agreed, the court say:—"As to the objection that the jury, after the cause was committed to them, were permitted to separate before they agreed on a verdict, it may be said that such has been the immemorial usage in this state; and the practice has been sanctioned by a decision of this court."

The case to which the court alludes, is *Brandin v. Granis*,<sup>(3)</sup> in error, a slander case. The defendant moved in arrest, on the ground that the jury, immediately after the cause was committed to them, dispersed into different parts, and so remained till next morning, when they convened at the jury room, considered the cause, and agreed on their

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(1) 3 Cowen, 355. (2) 1 Conn. Rep. 401. (3) *Ibid.* 402.

verdict. The court denied the motion, and the defendant brought a writ of error. *Baldwin, J.*, the other judges concurring, except *Smith, J.*—"The question presented by this record is, whether consistently with the act, a jury may separate, after a cause has been committed to them, and before they have agreed on a verdict. The only clause applicable, is in these words: 'When the court have committed any cause to the consideration of the jury, the jury shall be confined under the custody of an officer appointed by the court, until they are agreed on a verdict.' Whatever might have been my opinion of the effect of this statute, had I been called to decide upon it without the aid of practical construction, I do not feel myself now at liberty to oppose a uniform practice under it for a century, unless the construction shall appear unreasonable, and the practice in pursuance of it be followed with greater mischief, than would flow from a literal compliance with what is claimed to be the letter of the statute. I have never known in our courts a jury confined in the manner claimed. Reliance has always been placed on the guard set upon jurors by the peculiar form of their oath. It is evident from that, that our ancestors did not mean to introduce the system of starving a jury into agreement, but that their verdict might be the result of cool deliberation. The statute now in question is to be construed that the jury should be attended to and from court by an officer; should deliberate by themselves under his direction; and that he should guard them from intrusion. But it does not require that they should be otherwise restrained, nor that they should be prevented from adjourning and separating when occasion requires. This construction of the statute does not appear to me unreasonable. It is certainly conformable to the temper of the times, and the habits of our citizens. And I am not convinced that we are now bound to abandon it after it has been sanctioned by so long and quiet usage; nor that the advantages would overbalance the inconveniences resulting from a change."

So, in *Rhode Island*, in *Burrill v. Phillips*.<sup>(1)</sup> Before the verdict agreed upon, one of the jurors separated by mistake, and afterwards rejoined his fellows, who rendered their verdict; and upon motion it was held, to be in the discretion of the court to allow the verdict to stand. And, per *Story, J.*—"It is admitted on all sides, that the conduct of the jurors, in the present case, was through mere simplicity and ignorance. At first I was struck with the inconvenience of allowing a verdict, after a separation of the jurors, and when opportunity had been given to tamper with them. And, without doubt, as this is an application to the discretion of the court, the verdict ought to be set aside, unless the conduct of the juror be free from unfavourable presumption. I am perfectly satisfied with the verdict in this case; indeed, I do not see how it could have been otherwise upon the evidence before the jury, and I should feel great reluctance in setting aside a verdict, so well founded in law and justice. I am glad to be relieved from all doubt by authority. The case of *St. John v. Abbot* is directly in point, and the distinction assumed by the plaintiff's counsel seems, in general, well supported. I overrule the motion to set aside the verdict. Let judgment be entered for the plaintiff."

So, in *New-Jersey*, *Crane v. Sayre*.<sup>(2)</sup> While an argument was pending before the justice, as to the competency of certain testimony, some of the jurors left the room, and returned again without leave or consent, and without an officer to attend them. *Per Cur.*—"A juryman who leaves his fellow jurors without notice or leave, certainly treats the court with great contempt, for which a fine ought to be imposed on him, as soon as the verdict is rendered; and he ought to be committed till the fine is paid. It would retard the trial extremely, and work great

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(1) 1 Gall. 360.

(2) 1 Halst. 110.

confusion to the parties, if the court had to call the list of jurors every few minutes, to be sure they were all present, as must be done if jurors may go off without notice or leave. But a verdict is never set aside for a juror's misbehaviour towards the court, unless it is prejudicial to one or other of the parties, and no such thing appears in this case."

So, in *Massachusetts, Winslow v. Draper*.<sup>(1)</sup> Action on the case for deceit, in representing one Hall as worthy of credit. The jury retired at about one o'clock for the purpose of making up their verdict, and separated at about four in the afternoon of Saturday, the judge having authorized them to separate, when they should have agreed upon and sealed up their verdict. On the following Monday morning they appeared in court, and rendered in a verdict, "that the defendant did not say that Hall was perfectly good, knowing it to be false, and with intention to defraud the plaintiff." The verdict was objected to, as not finding the issue one way or the other, and the court directed them to retire again; informing them that the issue was, whether the defendant was or was not guilty. The jury then retired, and came in again with a similar verdict, with the addition of these words, "and they thereupon find that he is not guilty in manner and form," &c.

The plaintiff moved for a new trial, among other reasons, because the jury separated before they found a verdict on the issue submitted to them; and because, after they had separated, and a whole day had intervened, they were sent out again to agree upon a verdict. But, *Per Curiam*—"It seems to be settled, that a mere separation of the jury of itself, does not vitiate a verdict; but in the cases where this principle was established, the separation was probably for a short time, and we should not be willing to adopt it, where

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(1) 8 Pick. 170.

the separation should be for so long a time, as from Saturday to Monday. But here the jury agreed on a verdict in substance before separating."

In *Virginia*, it would appear from the case of *The Commonwealth v. M'Coul*,<sup>(1)</sup> that the courts take a distinction in criminal cases, and will not put it upon the party moving to show, but will presume, abuse, in order to avoid the verdict. The trial continued four days: on each of which the court adjourned for about two hours, giving orders that in the meantime the jury should be kept together in a room by themselves, where they were allowed refreshments. On their way to the jury room, at the second adjournment, one of the jurors having been unexpectedly sworn on the jury, separated from his fellows for about twenty minutes, to attend to some necessary business. His pretence was, that he wished to dine at home. His departure was opposed by the sheriff, who admonished him not to go, and took hold of his arm to prevent him. He went, however, unattended by an officer, there being none in waiting who could conveniently attend him. The juror stated that he believed the court, at that time, did not instruct the jury to remain together; and he understood the design of the adjournment was, with the view, that the jury might obtain some refreshment. He ate his dinner at his boarding house, and returned. Several persons asked him if the trial of M'Coul had ended, to which he answered in the negative; but he had (as he stated) no further conversation with any one on the subject of the trial; denied that he had been practised with, and no abuse appeared. Another jurymen was absent a few minutes on a visit to his sick child, with an officer, from whom he was separated about five minutes on going into his chamber to see the child. The jury rendered a verdict of guilty.

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(1) *Virginia Cases*, 271.



In setting aside the verdict, the court, among other things, well observe : "The old rule was that the jury on no occasion should separate. But it has been relaxed, in cases of imperious, or perhaps of unavoidable necessity. By allowing that a jury may separate without necessity, and that the verdict shall stand, unless the party accused, who in these cases is in the custody of law, can show that the jury not only have separated, but that they, or a member of it, has also been tampered with, or held communication on the subject, this great barrier against oppression may gradually be sapped and undermined, and the bulwark cannot long remain. Such a precedent would be productive of evils incalculable, and too great for the court, by its decision, to allow a door to be opened for."

So, in *North Carolina*, in *The State v. Garrigues*,<sup>(1)</sup> where the jury separated without permission of the court, before verdict rendered, their misconduct was held to be fatal, and the prisoner was discharged. But in a subsequent case, *The State v. Carstaphen*,<sup>(2)</sup> on an indictment for perjury, it was held that if jurors retire, from the court without permission, or an officer, and return immediately, without speaking to any one, the verdict shall stand. And in *Kentucky*, in *Brown v. M'Connel*,<sup>(3)</sup> it was held that the separating of the jury before rendering their verdict, though it be a misdemeanor, for which they may be punished, does not vitiate their verdict.

So that the rule may be regarded as of universal application at this day, that the separation of the jury, in civil actions, with or without permission, or the consent of parties, where no abuse is shown or suggested, will not avoid the verdict. And that the rule will apply to criminal cases, where the separation is by permission of the court, or where, from their inadvertence and misapprehension, a

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(1) 1 Hayw. 241.    (2) 2 Hayw. 238.    (3) 1 Bibb, 265.

momentary separation occurs, when it is clear no opportunity to practise upon the juror could have been presented.

Perhaps the only thing that looks like an exception to the rule, will be found in some late cases in the circuit court of the United States for the state of Connecticut,(1) where the court give a more rigid construction than the state courts, to the section of the statute providing, that where "the court have committed any case to the consideration of the jury, the jury shall be confined under the custody of the officer appointed by the court, until they are agreed on a verdict.(2) According to these decisions, the separation of the jury, under any circumstances, *ipso facto*, avoids the verdict.

As to the separation of the jury, after they have agreed upon their verdict, the practice in the state of New-York appears to be settled thus: In criminal cases the jury are not permitted to seal their verdict and separate; but in civil cases the uniform practice is, to permit the jury, with consent of parties, which will be presumed, if not objected to, to seal their verdict, if the court be likely to adjourn in the mean time, and thereupon to separate, and to return at the opening of the court to render their verdict. And should, as sometimes happens, some of the jurors dissent, the jury will be directed to retire, and the verdict being finally agreed upon, will not be avoided for the irregularity. All this was ruled in the recent case of *Douglass v. Tousey*.(3) The plaintiff had a verdict, and the defendant moved for a new trial, on grounds sufficiently explained in the opinion of the court. *Per Curiam*.—"The defendant also asks to have the verdict set aside on the ground of irregularity. It was late in the evening when the cause was committed to the jury. The judge, without the expressed

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(1) Vide 3 Day, 287, and *in notis* 310, 311.

(2) Vide 1 Conn. Rep. 401.

(3) 2 Wendell, 352.

consent of the counsel, directed them to seal up their verdict, and bring it into court the next morning. They presented their sealed verdict according to the direction of the court, and when polled, one of them refused to agree to it. When asked why he signed the verdict, he said he was unwell, and unable to sit up all night. The judge sent the jury out again, and they finally brought in the same verdict which they had signed and sealed the evening previous. The juror, who had dissented from the sealed verdict, stated to the court that he had received such explanation of the testimony from his fellows, that he was satisfied with the verdict. The ancient strictness in regard to the conduct of jurors has, of late years, been somewhat relaxed.—In the case of *Bunn v. Hoyt*,<sup>(1)</sup> a question arose very similar to that now before the court. The jury retired, deliberated several hours, sealed their verdict, separated, and the next morning brought it into court. On being polled, one of them disagreed to it. The judge sent them out again, and the disagreeing juror ultimately assented to the verdict, which had first been brought in under seal.—In this case the trial closed at a late hour at night, and the judge directed the jury to seal their verdict, and gave them permission to separate. There being no objection to this course on the part of the defendant, he must be deemed to have tacitly assented to it. The verdict cannot, therefore, be set aside for the alleged irregularity in receiving it.”

A similar case and decision occurred in *Edelin v. Thompson*.<sup>(2)</sup> The parties agreed that the jury might give their verdict to the clerk of the court after the adjournment for the day, and the jury having signed and sealed a verdict, delivered it to him, but on being called to the bar the next morning, before it was recorded, they were sent back to their chamber by the court, to correct it, as it did

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(1) 3 Johns. Rep. 253.

(2) 2 Har. & Gill, 31.

not determine the issues joined in the cause to their full extent, and they found a new verdict which did: *Held*, that the first verdict might be compared to one received by a judge out of court, or to a sealed verdict retained by the foreman of the jury in his pocket ; in neither of which cases is the verdict binding upon the jury, but is liable to be changed and varied from by them in open court ; and that a judgment entered on the second verdict was correct.

7. But if the jury, before agreeing, have dispersed, whether with or without leave or consent, and abuse the liberty thus taken or allowed, their verdict will be set aside, and a new trial granted.

Instances of abuse tending to vitiate the verdict, such as conferring with the parties or their agents, or receiving papers from them relative to the matter at issue, or examining witnesses apart, have already been noticed.(1)

It was formerly held, that if the jury ate and drank between the charge and the verdict, it would avoid the verdict. Thus, as early as the 24th of Edward III. (1351,) the jury were sworn and committed to the care of the sheriff, and when the justices would have taken the verdict, certain persons deposed, that victuals and drink were brought to the jurors after their charge, and that they were suffered to go out ; for which reason the justices refused to take their verdict, because it was suspicious, and complaint was made of this to the king by bill, which he endorsed to the justices in *banco regis*, to do right and reason ; and the under sheriff by his servant confessed that he admitted them to go at large ; and because this appeared of record, his misdemeanor, and he was an officer, a *capias* was awarded against him ; and because their going at large, and victuals and drink being carried to them was only a

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(1) Ante, Chap. III.

surmise, a *venire facias* was awarded against the jury and the trespassers, and between the parties a *venire facias de novo* was awarded.(1)

So, in the 35th of Henry VI. (1457,) it was adjudged, that if jurors eat and drink after they are together, by which they agree to their verdict the sooner, they shall make fine, and the verdict is void, and a new *venire facias* shall be awarded.(2) In like manner, in the 14th of Henry VIII., (1503,) the jury found for the plaintiff, and the defendant came and said, that the jury, between their charge and their verdict, had taken meat and drink. A new *venire facias* was awarded, and the verdict adjudged void.

But the jury might partake of refreshments, by permission of the court, without affecting their verdict, providing no abuse of the indulgence followed. The law is thus laid down by the author of "The Doctor and Student,"—"I take not the law of the realm to be that the jury, after they be sworn, may not eat, nor drink till they be agreed of the verdict; but truth it is, there is a maxim, and an old custom in the law, that they shall not eat, nor drink after they be sworn, till they have given their verdict, without the assent and license of the justices. And that is ordained by the law for eschewing of divers inconveniences that might follow thereupon, and that specially if they should eat or drink at the costs of the parties; and therefore if they do contrary, it may be laid in an arrest of the judgment; but with the assent of the justices they may both eat and drink. As if any of the jurors fall sick before they be agreed of their verdict, so sore that he may not commune of the verdict, then, by the assent of the justices, he may have meat and drink, and also such other things as be necessary for him, and his fellows also, at their own costs, or at the indifferent costs of the parties, if they so

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(1) Bro. Abr. Verdict, pl. 17.

(2) Ibid.

(3) Ibid.

agree, or by the assent of the justices, may both eat and drink.”(1)

It soon became necessary to extend this rule farther, and a more convenient practice succeeded. So early as Henry IV., it was held, that if the jury eat and drink at their own expense, though punishable for it as a misdemeanor, it would not avoid the verdict.(2) So in *Hall v. Vaughan*, the jurors ate and drank at their own costs before verdict, and after their departure from the bar, and this was certified upon the *postea*, yet the verdict was held not to be void, but that the jurors were fineable. It seems otherwise if at the costs of either of the parties.(3)

So Lord Coke, “If the jury after their evidence given unto them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is fineable, but it shall not avoid the verdict; but if before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant it shall not avoid it, *et sic e converso*.”(4)

In *Munson's* case, the jury having retired to confer on their verdict, and some of them having carried fruit with them, and before they were agreed, having eat of the fruit, these latter were committed to the fleet and fined, and it was moved to set aside the verdict, for this misdemeanor of these jurors; but, because it appeared that they did not eat by the aid, procurement, or means of the plaintiff or defendant, the verdict was sustained.(5)

In *Duke of Richmond v. Wise*.(6) It appeared; the jury had conveyed to them bottles of wine, which, with other things were put in a bill afterwards, and paid by

(1) Doctor and Student, 271.

(2) Bro. Abr. Jurors, pl. 12.

(3) 2 Morgan, 20.

(4) Co. Litt. 227.

(5) 1 Ander. 183.

(6) 1 Vent. 124.

the plaintiff's solicitor. The judges all agreed, that if the jury eat or drink, at the charge of the party for whom they find the verdict, it disannuls the verdict. But here it did not appear that the wine they drank was had, by order of the plaintiff, or any agent for him. It was true, in regard, his solicitor paid for it afterwards, it did induce a presumption that he bespoke it; but that again was extenuated by its being put into a bill with other things that were allowable, and it was not proved, that the wine was provided by him; the verdict was accordingly sustained, and the jury fined.

So, in *Harrison v. Rowan*.<sup>(1)</sup> The jury having found in favour of the plaintiff, the defendant now moved the court for a re-trial of the issue, upon the following grounds: 1. That the jury, before they had agreed on a verdict, ate and drank at the expense of the plaintiff, in whose favour they found, without the leave of the court. There were other grounds. It appeared, that the jury were furnished with refreshments of meat and drink, more than once before they had agreed upon their verdict; but not provided at the request, or with the knowledge of the plaintiff. After the jury had delivered in their verdict, and were discharged, the plaintiff ordered a breakfast to be prepared for them, at the same inn where they had been confined, of which they partook; after which the innkeeper made a gross charge against the plaintiff, in which he included in one sum the cost of the breakfast, and of the refreshments before furnished to the jury; but without distinguishing them, and the bill was paid by the plaintiff. It does not appear that the plaintiff knew at the time that the refreshments were so charged.

*Washington, J.* "The rule long established and uniformly observed is, that the jury are guilty of misbehaviour, if, after they are sent out, and before their verdict is rendered, they eat or drink without the permission of the

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(1) 4 Wash. C. C. Rep. 32.

court ; but the verdict cannot be impeached for that reason, unless it appear that the refreshments furnished were at the expense of the party in whose favour the verdict is found ; and where this is the case, the court will only grant a new trial.—But neither the rule nor the reason of it applies to this case. The refreshments were not provided at the expense of the plaintiff, nor with his privity or consent. Nor does it even appear, that when they were furnished, the innkeeper intended to charge the plaintiff with them, or that he supposed he was authorized to do so, in consequence of any custom prevailing in this state in similar cases. Neither does it appear, that when the bill was paid, the plaintiff knew that refreshments had been furnished the jury ; although, if the fact had been otherwise, the court is not prepared to say, that that circumstance would affect the verdict."

And in the recent case of *Purinton v. Humphreys*,<sup>(1)</sup> it was held that a verdict will not be set aside, because the jury, without the privity of the prevailing party, and being fatigued and exhausted with the length of the trial, were furnished with some refreshments at their own expense, during their deliberations on the cause, however liable the jurors might be to personal admonition from the court for such misconduct.

It will be seen from the cases cited, that eating and drinking at the expense of the prevailing party has been always held to vitiate the verdict, and that, whether alleged before verdict received or afterwards, by affidavits on motion, or even after motion in arrest of judgment.<sup>(2)</sup>

8. Indeed, any act of jurors who have separated from, or while in consultation with their fellows, clearly indicative of a destitution of moral principle, and the absence of

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(1) 6 Greenl. 379.

(2) Vide 2 Lev. 140. Barnes, 441. 443.



a due consideration of the solemnity of their oath, will avoid the verdict.

The principle contained in this rule, cannot be better illustrated than in *Wats v. Brains*.<sup>(1)</sup> It was an appeal of murder. The defendant set up, as a justification, that the deceased had, when passing his shop, made a wry mouth, and mocked him, and it was contended there was not evidence of malice prepense. But the judges gave their opinions, "that if one make a wry or distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder; for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel, and so delivered the law to the jury." Notwithstanding the evidence was pregnant against the defendant, eight of the jury agreed to find him not guilty. But the other four withstood them, and would not find it other than murder. On the next morning, two of the four agreed with the eight to find him not guilty; and afterwards the other two consented in this manner, that they should bring in and offer their verdict not guilty, and if the court disliked it, that they all should change the verdict and find him guilty. Upon this agreement they came to the bar, and the foreman pronounced the verdict, that the defendant was not guilty; which the court much disliking, examined every one of them by the poll, whether that was his verdict. Ten of the first part of the panel, severally affirmed their verdict. But the two last discovered the whole manner of their agreement, Whereupon they were sent back again, and returned and found the defendant guilty. And for this practise the foreman was afterwards fined £100. And the other seven who agreed with him at the first, every of them was fined

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(1) Cro, Eliz. 778,

**£40.** And the other two who agreed with the eight, **although** they affirmed that it was because they could not **endure** or hold out any longer, yet for that they did not **discover** the practice, being examined by poll, but affirmed **the** verdict, were fined each of them £20, and all of them **imprisoned**. But the other two were dismissed, yet blamed **for** consenting in abuse of the court.

**In *Dana v. Roberts*.**(1) Verdict for the plaintiff. **Motion** in arrest of judgment, that one of said jurors, while **they** had the cause under consideration, related to a Mr. **Merrills** the full state of the case, and of the evidence on **both sides**; the facts being proved, the court set aside the verdict. *By the court.*—"The principal guard upon jurors in this state is, their oath and their virtue. If they are suffered to enter into conversation with people respecting the causes they have under consideration, the purity of trials by jury, the great barrier of liberty and justice will be corrupted; it ought therefore to be guarded with the most vigilant attention.

So, if the jurors, being charged with the cause, indulge in spirituous liquors, as in *The People v. Douglass*.(2) The jury empannelled to try the prisoner upon an indictment for murder, were allowed to leave the court-house during the trial, under the charge of two sworn constables. Two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them conversed on the subject of the trial. They returned and heard the trial through, and joined in a verdict of guilty. Held, that the mere separation of a jury, though empannelled to try a capital offence, and though

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(1) 1 Root, 134, et vide 429, and 2 Root, 451.

(2) 4 Cowen, 26.

they separate contrary to the directions of the court, will not of itself be a sufficient cause for setting aside the verdict. But if there be the least suspicion of abuse, the verdict should be set aside; and for this cause a new trial was granted.

And in *Brant v. Fowler*.<sup>(1)</sup> After the judge had concluded his charge, several of the jurors requesting permission to go out, the judge told them they could go accompanied by an officer. One of them misunderstanding the charge of the judge, while out, separated himself from the officer, and drank about one-third of a gill of brandy. There was a verdict for the defendant, and on motion of the plaintiff to set aside the verdict for irregularity, the affidavit of the juror was produced, showing his mistake; and that he drank this small quantity of brandy to check a diarrhœa, which he had incurred by drinking new cider. The affidavit of another juror was also produced, showing that the juror who had drank joined them for deliberation, in due season; conducted himself with great propriety; was chosen foreman, and delivered their verdict. But *Per Curiam*. "We cannot allow jurors thus of their own accord to drink spirituous liquor while engaged in the course of a cause. We are satisfied that there has been no mischief; but the rule is absolute, and does not meddle with consequences, nor should exceptions be multiplied. We have set aside verdicts in error for this cause, even where the parties consented that the jury should drink. The *People v. Douglass*, though a criminal cause, is in point, for the principle of this motion, which must be granted."

So when the jurors have resorted to artifice to get rid of their confinement. As in *Oliver v. The Trustees of Springfield*.<sup>(2)</sup> The jury told the constable they had

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(1) 7 Cowen, 562.

(2) 5 Cowen, 283.

agreed, and dispersed. The next morning they delivered a paper, purporting to contain their verdict, which was, on opening it, found to contain these words : " The jurors, after due deliberation, do not agree ;" and signed by all the jurors. Before the jury re-assembled to deliver the paper, some of them were seen in a bar-room, where the cause was much talked of. On the paper being delivered, the judge, after explaining certain testimony, as to which the jury disagreed, directed them to retire and reconsider the case, which they did, and afterward returned a verdict for the defendants. Upon motion for a new trial, the court observe : " In the cases cited of verdicts sustained, notwithstanding the separation of the jury, there was no suspicion of abuse ; and indeed it appeared affirmatively, that there was nothing that followed their separation, which could be injurious to the party seeking to get rid of the verdict. The present case is far different. After practising a fraud on the constable, several of the jurors are found in a public bar-room, where the subject of the suit is much talked of in their presence ; and it is not pretended that they did not listen to the conversation, and might not have been influenced by it. This is not to be tolerated. Here is not only suspicion of abuse, (and we have uniformly held, that the slightest suspicion of this sort will vitiate the verdict,) but we think the circumstances of this case amount to positive abuse. They evince that want of respect in the jury, to the obligations imposed upon them by their situation, which cannot be sanctioned consistently with the rights of parties. They procured their separation by a very unbecoming artifice ; thus placing themselves in a situation to be practised upon, and influenced by conversation out of doors. Such conversation was carried on in the presence of some of them. Indeed, it is difficult to see how the suspicions, which attach to this case, could be explained away. The motion must be granted."

9. If the jurors, unable to agree, resort to the determination of chance, it will avoid the verdict. Thus it has been held to cast or draw lots, to shuffle half-pence in a hat, or play cross and pile, to find a verdict, will avoid it.

In *Mellish v. Arnold*,<sup>(1)</sup> an action against an officer for a seizure *absque probabili causa*. A new trial was granted because the jury threw up cross or pile, whether they should give the plaintiff three hundred pounds or five hundred pounds damages, and the chance of five hundred pounds came up.

So, in *Parr v. Seames*.<sup>(2)</sup> Motion to set aside the verdict. The jurors, upon differing in opinion, had agreed to be determined by hustling half-pence in a hat; if the major part came up heads, the verdict was to be for defendant. This matter not appearing, upon the oath of any of the jurors, but by affidavit, that two of them had confessed the same, the court, upon the first motion, ordered the entry of final judgment to be stayed for a few days only, to give plaintiff an opportunity to procure affidavits from some of the jurors. But it afterwards appearing that the jurors were fearful to make affidavits, whereby to accuse themselves, and *Chapple* citing a case in Salkeld, *Dent v. The Hundred of Hertford*, the court entertained the motion, and enlarged the rule till next term.

So, in *Hale v. Cove*.<sup>(3)</sup> The jury having sat up all night, agreed in the morning to put two papers into a hat, marked P. and D., and so draw lots. P. came out, and they found for the plaintiff, which, although it happened to be according to the evidence and the opinion of the judge, yet, upon motion for a new trial, it was agreed, that the verdict must be set aside.<sup>(4)</sup>

Upon the same principle, if the jury should agree

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(1) Bunb. 51. (2) Barnes, 438. (3) 1 Str. 642.

(4) Et vide 2 Blac. 1299. 1 Term Rep. 11. 1 New Rep. 326.

each to put down a sum and divide by twelve, and the result to be the verdict, it would be set aside. The question first came up in New-York, in *Smith v. Cheetham*,<sup>(1)</sup> on an affidavit of the constable who attended the jury, stating that after they had retired to their room to agree on their verdict, and while discussing the matter, he heard one of them say one cent damages was enough ; another that six cents damages and six cents costs were sufficient. That he afterwards saw at least six of the jurors take a pen, and mark down, what he believed and understood to be, the sum that they thought proper to give as damages in the cause, and from what he then saw and heard he understood the whole sum should be divided by twelve, and the quotient was to be the verdict. That two of the jurors had since owned to him, that the verdict was determined by an agreement, that each should put down such sum as he thought proper, that the whole should be divided by twelve, and that the verdict was really thus determined. The court were unanimous that the verdict for this cause was void, but differed as to whether the confessions, of the jurors to the constable afterwards, ought to have been received, were a majority being of opinion, that such evidence might be admitted.

In *Harvey v. Rickett*,<sup>(2)</sup> upon a similar state of facts, the court reversed the judgment, the facts appearing on the record. So, in a recent case, *Roberts v. Failis*,<sup>(3)</sup> a similar statement being made and assigned as error in fact, the court reversed the judgment below.

So ruled in *Connecticut*, in *Warner v. Robinson*,<sup>(4)</sup> Action on the case upon a recommendation in writing of one Richard Spelman, as a person of credit. Issue to the jury—who found for the plaintiff. Mo-

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(1) 3 Caines, 57.

(2) 15 Johns. Rep. 87.

(3) 1 Cowen, 238.

(4) 1 Root, 194.

tion in arrest, and among other exceptions, for that the jury were greatly divided in opinion with respect to the damages, and that they agreed upon the following method to assess them, viz : each to mark a sum on a piece of paper and put it into a hat ; and that the twelve sums thus marked, being added together and divided by twelve, the quotient should be the sum of damages ; and that the damages were thus found and assessed by the jury. The court found the facts to be proved, by inquiry of the jurors ; and arrested the verdict upon the principle, that in trials nothing is to be left to hazard or chance.

But if, after the jurors have conscientiously declared each his amount of damages, they agree to adopt as a mode of arriving at a unanimous result, that the sums are to be added and divided by the number of jurors, as the average amount of their opinions, it will not vitiate the verdict. This distinction is taken by the court in *Dana v. Tucker*,<sup>(1)</sup> where it appeared this mode of computation had been resorted to, and on motion for a new trial on that ground, the court take this distinction :—" If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result, at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper ; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict. Such appears to have been the case here, and after the result of the division was known, they individually assented to the sum as their verdict."

The same distinction is recognised in *Grinnell v. Phillips*.<sup>(2)</sup> On motion for a new trial, it appeared, on the examination of a juror in open court, that ten of the jury,

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(1) 4 Johns. Rep. 487.

(2) 1 Mass. Rep. 541.

before an unanimous consent in a verdict for the plaintiff, named each of them a sum for damages; the witness and another juror refusing to name any sum. The sums mentioned being added together, the amount was divided by twelve, and the sum thus found, became the amount of damages in which all the jury finally agreed. Their verdict afterwards delivered, and confirmed in court, in the presence of the witness, and the other juror who had before dissented, was there received and recorded. *Sewall, J.* "The facts sworn by this witness do not warrant the charge of gross misbehaviour, or show any impropriety of conduct in the jury, sufficient, in my opinion, to invalidate their verdict. The record of a verdict implies an unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact. Besides, the secret intention, or mental act of a juror can never be a subject of legal inquiry, and from the necessity of the case, his conduct before the court is the best and only evidence, that can be admitted, of his assent to a verdict delivered in his presence. The members of a jury, before they agree, must argue the questions of the case committed to them, and each man may be supposed to express his opinion, as to the general question, for which party the verdict shall be, and, if for the plaintiff, for what amount of damages. It is not important, as it strikes me, by what method a sum for damages shall be proposed, if finally there is an unanimous assent of the jury to the sum declared by their verdict."

And in *Virginia*, on appeal in *Shobe v. Bell*.<sup>(1)</sup> Action of slander, and verdict for the plaintiff, with \$450 damages. It appeared, by the affidavits of four of the jury, that it was proposed in the jury room, that each man should put down a sum, and that the whole should be added up and divided by twelve. They did so, and the sum came out \$487.

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(1) 1 Randolph, 39.



This sum they did not agree to ; and the plan of dividing by twelve was abandoned. Nine of the jury, after some consultation, agreed on \$450 ; the other three thought the sum too high, and one of them said, if it had been left to him alone, he would only have given from \$40 to \$50. But finding a large majority against them, despairing of getting the verdict lower, and believing they would be detained on the jury until all agreed, they yielded to the opinion of the majority, and assented to bringing in the verdict for \$450. A motion was made for a new trial, because the jury divided by twelve, and three of them yielded their verdict from an improper influence. The court below overruled the motion, and gave judgment for the plaintiff ; and this judgment was affirmed by the court of appeals.

So, in *Pennsylvania*, in *Cowperthwaite v. Jones*,<sup>(1)</sup> argued and decided in the common pleas, and affirmed in the superior court, in error. The point was taken against the mode of computing the damages, and the court, in denying the motion for a new trial on that ground, observe, that the objection as to the manner of the jury collecting the sense of its members, with regard to the quantum of damages, does not appear to be well founded, or at all similar to the case of casting lots for their verdict. "In torts and other cases, when there is no ascertained demand, it can seldom happen that jurymen will at once agree upon a precise sum to be given in damages. There will necessarily arise a variety of opinions, and mutual concessions must be expected. A middle sum may, in many cases, be a good rule—and though it is possible this mode may sometimes be abused, by a designing jurymen fixing upon an extravagantly high or low sum, yet unless

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(1) 2 Dallas, 55.

such abuse appears, the fraudulent design will not be presumed."

But, although the practice both in England and this country seems settled as to the effect of the misbehaviour of the jury upon their verdict; it is by no means agreed how far evidence of their misconduct, either directly or indirectly derived from themselves, ought to be admitted. The policy of the law, the temptation to tamper with the jury, the distraction and delays that must result to the administration of justice, from facilitating attempts to, and multiplying the means of, disturbing verdicts, are urged against their admission on the one hand; and on the other, the gross injustice frequently occasioned to suitors, by means of the ignorance, weakness, impatience, prejudice, passions, and corruption of jurors. It is a part of the practice that has varied not only in different countries, but in the same country, at different periods.

Formerly the affidavits of jurors were admitted to prove their misconduct and impeach their verdict, and, upon such disclosures, to grant a new trial. As late as the 8th of George II., in *Philips v. Fowler*,<sup>(1)</sup> after a motion in arrest of judgment, and pending the consideration of the court, it being disclosed to the defendant, by two of the jurors, that they and their fellows being divided in opinion, had determined their verdict by casting lots, the defendant moved to set aside the verdict, upon an affidavit of the fact made by the two jurors, which was admitted as of course. And upon hearing counsel on both sides, one question was, whether, after motion in arrest of judgment, the defendant in this case could move to set aside the verdict. And the Lord Chief Justice, Mr. Justice *Denton*, and Mr. Justice *Comyns*, were of opinion, that though this motion seemed out of time by

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(1) Barnes, 441.

the general rule of practice, yet as it was founded upon a matter disclosed to the defendant after the motion in arrest of judgment, and was made before judgment pronounced, the court were bound to receive it; and the fact as to the jurors determining by chance being undisputed, the verdict was set aside. We have seen that in *Parr v. Seames*,<sup>(1)</sup> judgment was stayed, and the rule *nisi* enlarged, to allow an opportunity to present the affidavits of the jurors.

In *Aylett v. Jewell*,<sup>(2)</sup> it seems to have been taken for granted, that the jurors should have made an affidavit. Motion for a new trial, on an affidavit of the defendant's attorney, that some of the jury had confessed to him that, not being able to agree in their verdict, they consented that all the juror's names, being separately written on papers and shook together in a hat, the first six, that should be drawn, should decide the verdict. They all agreed to conform to the opinion of the major part of those six; which was accordingly carried into execution, and so the verdict was produced. But there being no affidavit by the jurymen, or any other that was cognizant of this transaction, but merely this hearsay affidavit, the court (absent, *De Grey*, Ch. J.) thought it too dangerous to call a verdict in question, that had been so deliberately given, upon so loose and slight a suggestion, and so refused a rule to show cause.

That this rule at one time prevailed here, is manifest, from the decision in *Smith v. Cheetham*.<sup>(3)</sup> *Spencer*, J. remarking on the admissibility of the affidavit of a juror which was received, observes: "On examining the English authorities, prior to the revolution, it appears to me that the information of jurors, as to what passed, may be received. The only decision to the contrary is in *Keble*."<sup>(4)</sup>

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(1) *Barnes*, 438.

(2) 2 W. Black. 1299.

(3) 3 *Caines*, 57.

(4) *Prior v. Powers*, 1 *Keb.* 811.

But it is a very unintelligible and illy reported case. The determinations in *Bunbury*(1) and *Barnes*,(2) show that the information of jurors may be received, and I cannot perceive any principle of law invaded by it." And *Livingston*, J., commenting upon the contrary rule, adopted by Lord Mansfield in *Vaise v. Delaval*,(3) remarks: "With proper submission to his lordship, it appears the best and highest evidence of which the case admits. If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged? Are not criminals in England every day convicted and even executed on their own confession? and is not our state prison filled in the same way?"

And it would appear from *Price v. Warren*, and *Shobe v. Bell*, above cited, that in Virginia, it is still the practice to read the affidavits of jurors, in support of a motion to set aside the verdict for the misconduct of the jury.

10. But the practice appears to be now generally settled, both in England and this country, to reject the affidavits of jurors inculpating themselves.

The leading case is *Vaise v. Delaval*.(4) Motion for a rule to set aside a verdict upon an affidavit of two jurors, who swore that the jury being divided in their opinion, tossed up, and that the plaintiff's friends won. Lord Mansfield, Ch. J.—"The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source; such as from some person having seen the

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(1) *Bellish v. Arnold*, Bunb. 51.

(2) *Philips v. Fowler*, Barnes, 441.

(3) *Infra*.

(4) 1 Term Rep. 11.

transaction through a window, or by some such other means."

Not long after, the same rule was adopted in the English common pleas, in *Owen v. Warburton*.<sup>(1)</sup> In resisting the admission of the affidavits of the jurors, the case of *Vaise v. Delaval* was chiefly relied on, and in deciding the motion, *Sir James Mansfield*, Ch. J., observes: "We have conversed with the other judges upon this subject, and we are all of opinion that the affidavit of a jurymen cannot be received. It is singular indeed, that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law, that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view, afterwards to set aside the verdict by his own affidavit, if the decision should be against him. We are therefore of opinion that there is no ground to support this rule."

The same rule has since obtained in this state. In *Dana v. Tucker*,<sup>(2)</sup> the court say: "The better opinion is, and such is the rule adopted by the court, that the affidavits of jurors are not to be received to impeach a verdict, but they may be admitted in exculpation of the jurors, and in support of their verdict."

This decision has been followed up in this court by *Sargeant v. Deniston*,<sup>(3)</sup> and by *ex parte Caykendall*,<sup>(4)</sup> taking the distinction between affidavits of jurors, impeaching and explaining their verdicts. In the latter case, where a *mandamus* was moved for, the court take occa-

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(1) 1 New Rep. 326.

(2) 4 Johns. Rep. 487.

(3) 5 Cowen, 106.

(4) 6 Cowen, 53. .

sion to observe, that "It is certainly well settled that the affidavits of jurors cannot be received to show a mistake in making up their verdict; and we never intended to detract from that rule in *Sargeant v. Deniston*. In that case the counsel advanced an erroneous rule of damages to the jury, which was not corrected in the charge of the judge. The jury were in this way led to adopt the rule. We considered these circumstances equivalent to a positive misdirection of the judge; and allowed the affidavits of jurors to be read, showing that they were in fact misled. It was impossible to make out what in truth operated, as a misdirection of the judge in any other way. Misdirection is a very usual ground for granting a new trial, and the case cited establishes merely, that a set of circumstances may amount to the same thing; and may be shown by the affidavits of jurors. Farther we did not mean to go; and we expressly disclaimed the idea of trenching on any of the cases, which had refused to hear the affidavits of jurors." And in *The People v. Columbia Common Pleas*,<sup>(1)</sup> the court again recognise the distinction, and confirm the rule, upon a review of all the cases, holding that affidavits of jurors cannot be received to show their impressions as to the effect of their finding, or that they intended something different from what they found by their verdict.

So, in *Vermont*, in *Robbins v. Wendover*.<sup>(2)</sup> Upon the question whether the affidavit of a juror should be admitted to show what passed, during the investigation of the case in the jury room, the court say—"Upon this point the court are decidedly of opinion that the affidavit cannot be admitted to be read;" and add—"It would be of dangerous tendency to admit jurors by affidavit to detail these

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(1) 1 Wendell, 297.

(2) 2 Tyler, 11.

deliberations of the jury room, to testify to subjects not perfectly comprehended at the time, or but imperfectly recollected. From a natural commiseration for the losing party, or a desire to apologise for the discharge of an ungrateful duty, after the juror had been discharged from office, he would be too apt to intimate, that if some part of the testimony had been adverted to, or something not in evidence omitted, his opinion would have been otherwise; whilst others of the panel, with different impressions or different recollections, might testify favourably for the prevailing party. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated. The court consider it to be far better to establish it as a general rule, that the affidavits of jurors respecting the deliberations which led to their verdict, should in no civil cause be admitted.”(1)

And in *Pennsylvania*, in *Willing v. Swasey*,(2) the court, adopting this rule, remark: “With respect to the deposition of the juror, we agree with Chief Justice Kent, in the case of *Smith v. Cheetham*, that the better opinion is, that it ought not to be read to show the irregularity of his own conduct, and differ altogether from Judge Livingston, who thinks the affidavit of a juror should be given in evidence to prove his guilt, like the confession of any other criminal. The affidavit, in such case, should be considered in a different light from the common confession of a criminal, and in my opinion it ought to be rejected, because it tends to defeat his own solemn act under oath, where third persons are interested. It ought to be rejected, because its admission would open a door to tamper with jurymen after they had given their verdict; it ought to be rejected, because it might be the means in the hands of a dissatisfied juror, to destroy a verdict at any time, after he

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(1) Vide 3 Gil. & Johns. 473.

(2) 1 Browne, 123.

had assented to it ; in fine, it ought to be rejected, because it would unsettle all the verdicts in the country."

In *Bladen v. Cockey*,<sup>(1)</sup> in the provincial court of Maryland, a question was raised how far a juror might be admitted or allowed to weaken his verdict, or indirectly to impeach it by answering to the grounds upon which it was founded ; and per *Dulany*, counsellor—" I must confess that I have doubts of the propriety in examining the jurors in the former trial. The former verdict shows the opinion of the former jurors, and as much as any thing they can now properly declare. Should a juror declare, that he gave his verdict, because the witness A. gave such evidence as he credited, and the witness B. such as he disbelieved, must not that be very improper, unless you go into the inquiry what did A. and B. declare upon the former trial ? And if A. and B. are alive, and capable of being produced, or if their depositions were before read, and may now again be produced, would this be proper ? If the witness be dead, and gave his evidence *viva voce*, a juror may be examined to what he declared ; but so may any other person who was present at the former trial, and therefore such evidence is not given by him in his character of juror. But I think the objection is much stronger, when the juror is introduced to weaken the verdict on record, for while it stands unattainted, it must be considered in all respects as a verdict."

Upon the same principle, as unfolded in the above cases, it has been held that where a judge directs the jury, that they are clearly bound to find a verdict for one party, and no objection is taken to the entering of the verdict for that party, the court will not grant a new trial, upon the affidavit of a juryman, stating that the jury had not concurred in such verdict. In

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(1) 1 Har. & M'Hen. 230.



*Saville v. Lord Farnham*,<sup>(1)</sup> a feigned issue was directed to try whether the plaintiff was entitled to a way over a common. At the trial, before *Bayley, J.*, before the defendant had concluded his case, the learned judge, being of opinion that the plaintiff had made out no title to the way, directed a verdict to be entered for the defendant. *Brougham* now moved for a new trial upon an affidavit by the plaintiff's attorney, and by one of the special jury. (Lord *Tenterden*, Ch. J.—Can you read the affidavit of a juryman?) Not as to the conduct of the jury, but here the affidavit of the juryman is introduced for a special collateral purpose: it states that the jury gave no verdict at all. *Bayley, J.*—"I said that there must be a verdict for the defendant, and the jury said nothing;" intimating by their silence an acquiescence in the verdict, and the court discharged the rule.

11. But for the purpose of explaining, correcting and enforcing their verdict, the affidavits of jurors will be received, on motion for a new trial.

In *Rex v. Simons*.<sup>(2)</sup> Upon a rule to show cause why a new trial should not be had in an indictment, it appeared from the report of *Foster, J.*, that the charge in the indictment was, that the defendant did privily and unlawfully convey into the pocket of *Ashley*, the prosecutor, three ducats, with a malicious and wicked intent, falsely to accuse the said *Ashley* of having robbed the defendant of the ducats; that when the jurors came into court to give their verdict, they mentioned to the judge a difficulty they were under, that they were of opinion that the defendant did put the ducats into *Ashley's* pocket, but not with intent to accuse *Ashley*; that the judge thereupon directed the jury that they could not find the defendant guilty of the

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(1) 2 Man. & Ryl. 216.

(2) Sayre, 35.

fact without finding him guilty of the intent, and that they must either find him guilty of both or acquit him ; that a verdict was soon after given, and understood by the judge to be a general verdict of guilty ; and that from the time of the coming of the jurors into court, to the time of giving the verdict, there was a great crowd and noise in the court. An affidavit was likewise read by all the jurors, that there was a mistake in taking the verdict ; that they had agreed to find the defendant guilty of the fact, but without any evil intention ; that one of them called out aloud at the time of giving the verdict, *no intent, no intent* ; and that the crowd and noise in court were so great, that they did not hear what the learned judge said, when they mentioned the difficulty they were under. And by *Lee*, Ch. J.—“The court does not set aside this verdict, on account of an after-thought of the jurors ; for it would be a precedent of a most dangerous tendency, to set aside a verdict on that account. But as it appears, from the report of the judge, as well as from the affidavit of the jurors, that they did not hear, or did not understand his direction, which was in our opinion a very proper one, the verdict ought not to stand ; because it is contrary to the direction of the judge in a matter of law. It is very clear that the jurors did not mean to find the defendant guilty of the intent ; and if they did not, they ought, pursuant to the direction of the judge, to have acquitted him.”

So, in *Cogan v. Ebdon*.<sup>(1)</sup> A motion was made to set aside a verdict, as being given in by the foreman, contrary to the opinion and intention of eight of the jury. It appeared that the defendant justified under a right of way over the plaintiff's ground, to two closes of the defendant, upon which two different issues were joined. The fore-

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(1) 1 Burr, 383.

man gave in the verdict as a general verdict for the defendant, upon both issues. But eight of the jury made affidavit, "That it was the meaning and intention of the whole jury to find the former issue for the defendant, and the latter for the plaintiff; and that this mistake was discovered by them an hour afterwards, but not till the judge was gone to his lodgings. This matter was much litigated by the counsel on both sides, and the counsel for the plaintiff mentioned the case of *Baker v. Miles*,<sup>(1)</sup> where eleven of the jurymen swore, that the foreman had mistaken their verdict, and it was thereupon set aside. The Court were all clear that this was a mistake, arising from the jury's being unacquainted with business of this nature; and from the associate's omission in not asking the jury particularly how they found each respective issue, and in not making the jury fully understand their own finding. That it was agreeable to right and justice, that the mistake should be rectified, and recommended a motion for a rule to show cause, why, upon reading the affidavits of those eight jurymen, the verdict should not be amended and set right according to the truth of the finding.

And ruled, taking the same distinction, in the *King v. Woodfall*,<sup>(2)</sup> that where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors or by-standers may be received upon a motion for a new trial, or to rectify a mistake in the minutes; but an affidavit of a juror never can be read, as to what he then thought or intended.

But the jurors' affidavits cannot be admitted under the pretext of explaining a mistake in their finding, with a view to vary the damages. Thus ruled in *Jackson v. Williamson*.<sup>(3)</sup> The plaintiff produced an affidavit made by all

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(1) Vin. Abr. Trial, pl. 12.

(2) 5 Burr, 2667.

(3) 2 Term Rep. 281.

the jurymen, saying that they meant to give £30 damages for the seizing and detaining 'the vessel, over and above the £31, for which, it appears, the vessel had been actually sold; and that they conceived, that the prothonotary would of course add the £30 to the £31, and thereby make the whole sum of £61, which the jury had intended to give. But the court refused to allow the *postea* to be amended, saying that it would introduce a very dangerous practice, if they were to admit such an affidavit as the one offered. They said, that they laid no stress upon its being made by all the jury; if it could be made by all, upon the same principle, it might as well be made by some. If any doubt had arisen as to the meaning of the jury; if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial. It was too late now. Such a practice would be productive of infinite mischief; and it was better that the present plaintiff should suffer an inconvenience, than that such a rule should be introduced.

The rule allowing the affidavits of jurors in support of, or to correct a mistake in, their verdict, was first adopted in this state, as we have seen in *Dana v. Tucker*;(1) upon a distinction taken in that case between impeaching and sustaining the verdict, and subsequently carried through the cases last above cited, from Johnson, Cowen and Wendell.(2) To these may be added *Jackson v. Dickenson*,(3) where the point underwent a full discussion. At the time of bringing on the case to argument, the defendant also moved for a new trial, on the grounds, that the verdict of the jury had been incorrectly taken, and of surprise, and for this purpose produced several affidavits. Upon which the court remark, "What the jurors have deposed must be noticed by the

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(1) 4 Johns. Rep. 487.

(2) Ante, pp. 112, 113.

(3) 15 Johns. Rep. 309.

court, because their affidavits are not as to what transpired while deliberating on their verdict, but as to what took place in open court, in returning their verdict, and shows that the clerk made a mistake in entering, or the court in directing, a different verdict. The information afforded by the affidavits of the jurors is not to impeach, but to support the verdict really given by them."

The same practice prevails in Virginia. In *Cochran v. Street*, (1) which was an action of slander, the jury assessed the damages to £150. Judgment was rendered on the verdict, and a bill of injunction filed, charging misbehaviour in the jury. The depositions of ten of the jurors were taken, and eight of them agreed in the fact, that part of their body were opposed to giving any damages at all, and that the verdict was found on the opinion of a majority. Four of them swore, that they did not incline to give any damages; that they did not dissent from the verdict, in consequence of a misapprehension of the law, and a belief that the opinion of the majority was to prevail; that they did not previously agree to be bound by the determination of a majority; and that if they had known that they could have prevented a verdict, till their consciences were satisfied, they would not have agreed to the verdict. There did not appear to have been any tampering with the jurors by any person, in order to obtain this testimony; and none of the jurors contradicted it. It was clear, therefore, that the verdict was found under a *mistake*; and the court of appeals decreed that a new trial should be had.

In Tennessee, the rule has received a latitude of construction in a capital case, and probably for that very reason, that will hardly comport with the general practice.

In *Crawford v. The State*, (2) where a juror not satisfied with the guilt of the prisoner, assented to a verdict of

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(1) 1 Wash. Rep. 79.

(2) 2 Yeager, 60.

guilty, under an impression, suggested by his fellow jurors, that the governor would pardon the prisoner, if the jury recommended him, it was held sufficient to avoid the verdict, on the ground of mistake ; and affidavits of the jurors to that effect were received, upon motion for a new trial.

But in Massachusetts, in a capital case, *The Commonwealth v. Drew*,<sup>(1)</sup> on a statement of facts very similar, the affidavit of a juror received no notice. On the last day of the term, Drew was brought up to receive his sentence, when his counsel moved the court to delay giving judgment because they had evidence that Richard King, who was a material witness for the government, had declared, before the trial, that he would hang the prisoner by his testimony, if he could, of which declaration he had no knowledge, until after the trial ; and because a Mr. Ingalls, one of the jury, did not agree to find the prisoner guilty of murder, but only of manslaughter ; and through mistake of his duty, he believed that he must assent to the verdict of the major part of the jury. The court did not inquire into the truth of these allegations, observing, that if they were proved, they could not avail the prisoner, on any legal principles, by which alone the court must be bound. So, in *North Carolina*, it has been held, that the affidavit of a juror, showing that he did not assent to the verdict, could not be received.<sup>(2)</sup>

12. When a jury render a perverse verdict, or one manifestly the result of prejudice or passion, and especially if they refuse to give their reasons, the verdict will be set aside. Thus,

In *Ash v. Ash*,<sup>(3)</sup> Assault, battery and false imprisonment. The Lady Ash pretended that her daughter, the

(1) 4 Mass. 399.

(2) *Suttrel v. Dry*, 1 Murphy's Rep. 94.

(3) Comb, 357,

plaintiff, was troubled in mind, and brought an apothecary to give her physic, and they bound her, and would have compelled her to take physic. She was confined but about two or three hours, and the jury gave her £2000 damages. The defendant moved for a new trial for the excessiveness of the damages ; and per *Holt*, Ch. J.—“ The jury were very shy of giving a reason for their verdict, thinking they have an absolute despotic power ; but I did rectify that mistake, for the jury are to try causes with the assistance of the judge, and ought to give reasons when required, that if they go upon any mistake, they may be set right.” And a new trial was granted.

So, in *The King v. Poole*.<sup>(1)</sup> A motion was made for a new trial, on an information against the defendant, to try the legality of his election as mayor of Liverpool. He was elected at an adjourned court, held by the former mayor, on the 19th of October ; the 18th of October being appointed by the charter for the election of mayor ; the question, therefore, turned on the power of the late mayor, so to adjourn, and preside at the court. The judge who tried the cause was of opinion that he had such power, and that the election consequently was good, and he so directed the jury. But the jury refused so to find ; and at last the judge ordered the jury to find a special verdict. But they brought in a general verdict, finding him not duly elected, with which verdict the judge certified himself to be dissatisfied. It was argued, in support of the verdict, that the direction of the judge was wrong in point of law, and the verdict right. Per Lord *Hardwicke*—“ The general rule is, that if the judge of *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial. And when the judge, upon a doubt of law,

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(1) Rep. Temp. Hardwicke, 23.

directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial.

This rule is strongly exemplified in a recent case in the King's Bench, *Levi v. Milne*.<sup>(1)</sup> The plaintiff, a sheriff's officer, having in the exercise of the functions of his office, received a warrant to execute a writ upon a party who had often eluded his pursuit, knocked at his door and gained admittance. Not respecting the assertion of the servant, that no such person as the party named in the *capias* lived there, the plaintiff proceeded up stairs to search the bed room, and observing something concealed under the bed clothes, turned them up, expecting to find the object of his search; but finding a female instead, he ran off. An action was brought against him for the trespass, in which he paid £100 damages. This circumstance the defendant, the proprietor of a periodical work, thought fit to represent in doggerel, aided by a ridiculous wood cut, descriptive of the scene. The plaintiff thereupon sued the defendant in an action for libel, and at the trial of the cause, *Best*, Ch. J., told the jury that the composition being calculated to render the plaintiff ridiculous, and to occasion pain to his feelings, was clearly a libel. The jury having inquired whether a shilling would carry costs, and being answered in the affirmative, found a verdict for the defendant. A new trial was moved for on the ground that the verdict was perversely rendered.

*Best*, Ch. J. "It is one of the most beautiful parts of our constitution, that when any thing occurs in one tribunal which appears to be wrong, it may be afterwards corrected by another, so that the interests of a party cannot be prejudiced by a hasty decision; otherwise the trial by jury, instead of being a blessing would become a source of evil.

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(1) 4 Bing. 195. S. C. 12 Moore, 418.



If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from an arbitrary decision. In the present case the jury have made themselves judges of the law, and have found against it. The publication is most undoubtedly a libel. It imputes misbehaviour to the plaintiff, states that he acted wrong in his situation as a sheriff's officer, and that he had conducted himself indecorously and indecently; holding him up in the most ridiculous light; and it has been frequently and long held by all the judges in Westminster Hall, that when such is the case, the party has been libelled. But here the jury took on themselves to find a verdict on the law of a case, in direct defiance of the judge, and I am therefore of opinion that their verdict should be set aside." With this opinion the other judges agreed, and a new trial was directed.

And in *Gainsford v. Blachford*.(1) The judge was stopped by the jury in summing up in favor of one of the parties, declaring themselves satisfied, and they found immediately for the other party. A new trial was granted, *Garrow*, baron, putting it entirely upon this ground, and observing, "When I find the judge interrupted by the jury, in summing up and about to direct them, as to the representations proved, not being sufficient in law to maintain the action; and they having thus misled the judge, give a contrary verdict, I cannot but think that that fact is a sufficient ground for granting a new trial.

So, in *Freeman v. Price*.(2) Action for a libel, and justification fully proved. The jury, contrary to the direction of the chief baron, found a verdict for the plaintiff, damages £10. Upon motion to set the verdict aside, it was objected that the damages were too small. But per *Alexander*, Ch. B. "The court is of opinion that this is

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(1) 6 Price, 38.

(2) 1 Youngs & Jervis, 402.

a perverse verdict, and to which therefore the rule with respect to damages does not apply. We think that the rule for a new trial should be made absolute, without payment of costs."

With us, the passions of the jury and perversity of the verdicts have been chiefly manifested in giving excessive damages, forming one exception to the general rule that new trials will not be granted in hard actions on the ground that the jury have abused their power. Thus in *McConnell v. Hampton*,<sup>(1)</sup> where the jury had in an action of assault and battery and false imprisonment, rendered a verdict of \$9,000. In assigning their reasons for granting a new trial, *Thompson*, Ch. J., remarks, "It must strike every one at first blush, that the damages given by the verdict are unreasonable and indeed outrageous. It is not therefore a case of a mere assessment of damages upon an undisputed state of facts, but where different men might very honestly draw different inferences, as to the motives which influenced the conduct of the defendant. To refuse a new trial in this case, would, in effect, be saying, that a new trial ought never to be granted in actions of this description." *Spencer*, J.—"In applying the general principle, every case must be tested by its own peculiar circumstances, and when the court cannot but perceive that the damages given are enormously disproportioned to the case proved, the only power claimed by the court is to submit the case to the revision of another jury."

So, in *Coffin v. Coffin*.<sup>(2)</sup> After the defendant had failed to obtain a new trial, upon the ground of misdirection, he renewed his application showing for cause, that the damages found by the jury were excessive. *The Court*, although a new trial was refused, recommended a remission of a portion of the damages, and recognised the prin-

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(1) 12 Johns. Rep. 234.

(2) 4 Mass. Rep. 1.

ciple, that, "when in an action for a tort, the damages found by the jury are so great, that it may be reasonably presumed the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice, or corruption, the court may set aside the verdict, and award a new trial."

So, in the *State v. Caleb Jones*.<sup>(1)</sup> The defendant and one *McCartan* were separately convicted of larceny. Judge *Waties*, before whom the defendants were tried and convicted, in his place on the bench, reported to the other judges, that in his opinion, there was no evidence offered in these cases, sufficient in law to convict either of the defendants, and so he charged the jury; but that such were the prejudices against the defendants, that they convicted them both, against his opinion and direction. Whereupon the court, upon his report, ordered a new trial, without hearing argument.

13. But the court will not permit affidavits to be received imputing improper motives to the jury, or tending to impeach their integrity.

In *Onions v. Naish*,<sup>(2)</sup> the plaintiff moved to set aside the verdict, on an affidavit that one of the jurors was a relation of the defendant, with whom he had been in habits of intimacy, and who had, during the interval between the postponement and trial of the cause, expressed himself in strong terms in favour of the defendant's cause. But the court refused to grant a rule to show cause, observing, it would be a very dangerous precedent to set aside a verdict upon such grounds as were offered in support of the application.

So, in *Hartwright v. Badham*.<sup>(3)</sup> A verdict was found for the plaintiff, and upon application for a rule to show

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(1) 2 Bay, 520.

(2) 7 Price, 203.

(3) 11 Price, 362.

cause why the verdict should not be set aside and a new trial granted, the affidavits contained, among other things, a charge against the foreman of the jury of exercising an undue influence over the rest of the jury. But the introduction of that matter in the affidavits being strongly censured by Mr. Baron *Wood*, the court, on that point, determined at once, that such parts of the affidavits as imputed misconduct to the jury, could not be received, for that it would be a dangerous precedent, and pregnant with infinite mischief, if they were to allow such matters stated in affidavits, to be urged in support of applications for new trials. The affidavits which had been filed were therefore rejected, as being impertinent in that respect; but the court directed that they should be re-modelled so as to omit those charges, and present such a statement of facts only as was necessary to show the contradiction of the testimony of the witness.

So, in a subsequent case, *Cooke v. Green*.<sup>(1)</sup> A verdict was found for the defendant, and upon a motion for a rule nisi, on circumstances affecting the conduct, and impeaching the integrity of some of the jury (who were suggested to have been prejudiced and tampered with) being about to be urged to the court, from affidavits made in support of the application, they refused to hear any thing imputing improper motives to the jurymen, observing that they had no authority, on such a motion as the present, to take notice of their misconduct, even if a strong and flagrant case were made out; and that the only means which they possessed of counteracting the evil consequences of such misconduct as affecting the party, were the granting new trials in cases where their verdict was palpably wrong, to whatever cause that might be attributed. The court granted the motion, ordering a rule to show cause; but

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(1) 11 Price, 736.

they directed particularly that care should be taken, in drawing up the order, to exclude every thing which might be construed to indicate that the rule was founded on the last ground of objection taken to the verdict, imputing partiality to some of the jury.

Nor will the court suffer the subsequent declarations of jurors to be given to disturb the verdict.

Thus, in *Hindle v. Birch*.<sup>(1)</sup> Action against the sheriff for taking insufficient sureties on a replevin bond. At the trial, before *Park, J.*, contradictory evidence, as to the sufficiency and solvency of one of the sureties was left to the jury, for their determination, by the learned judge, who stated, on the authority of *Hindle v. Blades*,<sup>(2)</sup> that if the sureties were apparently responsible, that was sufficient to discharge the sheriff. The jury found a verdict for the plaintiff. The defendant now moved to set aside this verdict, and have a new trial, on two grounds; first, because the verdict was against evidence, and secondly, on an affidavit of a sheriff's officer, which stated, that after the trial, one of the jurymen said to him, "One of your brother officers lately was served out in an action of *Hindle's*; he played me a dirty trick once, and I was determined to give him a lift whenever I could." It was admitted, that it had been decided, that the court would not admit the affidavit of a jurymen to show that the verdict proceeded on corrupt grounds, but it was urged, that the court would receive such information from another source.

*Dallas, J.* "As to the second point. I know of no instance in which the loose declaration of a jurymen, made after trial, has been received to draw into question a verdict, to which he has been a party. No instance is adduced in which such an affidavit, as that now before us, has been received, nor do I believe that such an affidavit ever has,

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(1) 8 Taunt. 26.

(2) 1 Marsh. 27.

in any case, been received. If such an attempt should be sanctioned, it would be of the worst precedent, for it would tend to draw the administration of justice into disrepute."

In *Davis v. Taylor*.(1) *Parke* moved to set aside a verdict for the defendant, on affidavits, that there was a conversation with jurymen; that the verdict was entered by mistake, and there were two persons who overheard it, the same day, after the cause was tried. (Lord *Ellenborough*, Ch. J.—'That will not do, unless it was at the time, and a part of the transaction, and whilst the jury were together.) *Parke*—Most of the cases in which an application of this nature has been refused, have been where the conversation has happened some time after the trial; but here it was on the same day. Lord *Ellenborough*—"It must be whilst the jury are together, otherwise we should have all sorts of stories brought before us."

But this privilege does not extend to the declarations of jurors, before they are empanelled in the cause.

It has been always held as a ground for a new trial, if a juror prejudge the case, and it is unknown to the failing party in time to challenge, as in *Dent v. The Hundred of Hertford*.(2) A new trial was granted upon affidavit, that the foreman had declared the plaintiff should never have a verdict, whatever witnesses he produced.(3)

The correctness of this principle was strongly tested in *The People v. Vermilyea*.(4) and still more strongly in *The United States v. Fries*.(5) Where, in a capital case, in consequence of the declarations of a juror prior to his being empanelled, evincing strong prejudice to the accused, a verdict finding him guilty was set aside.

But where such declarations are explained or falsified,

(1) 2 Chitty's Rep. 268.

(2) 2 Salk, 645.

(3) Et vide *Rex v. Cook*, 6 St. Trials, 337.

(4) 7 Cowen 108.

(5) 3 Dallas, 515.

and to this, the inculpated juror is perfectly competent, the verdict will not be disturbed. As in the recent case of *Ramadge v. Ryan*,<sup>(1)</sup> a case of libel of the plaintiff, who was a physician, in a periodical journal called "The Lancet," in which he was denounced as upholding quackery. The plaintiff had brought an action against *Wakley*, the editor, and recovered one farthing damages. In the present case he had recovered £400. *Taddy* sought to obtain a rule, on the ground, that one of the jurors had come to the trial, predetermined to give heavy damages against the defendant, and read an affidavit of two members of the college of surgeons, who were present at the trial of the cause of *Ramadge v. Wakley*; that at the conclusion of that trial, a person, whose name was not then known to them, came up, and expressed his surprise, at the small amount of damages, and at the same time said, "I shall be on the jury to-morrow, and I will take care that the verdict does not go that way;" that one of the deponents then remarked, that the individual addressing them had not yet heard any evidence, to which the individual replied, that "he had heard quite enough, and that his mind was made up, as to the verdict he should give." For the plaintiff, cause was shown upon an affidavit, in which the expressions alleged to have been used by *Hart*, the juror, at his house, were altogether denied, and in which *Hart* explained the conversation in Westminster Hall, by deposing, that his words were, "Well! I am surprised at such small damages; had I been upon the jury I should certainly have given very heavy damages"—"I am upon the jury to-morrow;"—that no other words escaped him; and that he never said, "I will take care the verdict shall not go that way to-morrow."

*Tindal*, Ch. J. "If the ground of application for a

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(1) 9 Bingham, 333.

new trial, disclosed by the affidavits on the part of the defendant, had remained unanswered and uncontradicted, I should have thought the court justified in making this rule absolute ; for it would go to create a prejudice against trial by jury, if verdicts were to be the result of previous determination, and expressions, such as those imputed to the juror Hart.—But the conversation, on the 31st of October, is denied altogether, as is also a portion of that alleged to have taken place on the 25th of June ; and the effect of the residue appears to me, to be sufficiently answered by Hart's affidavit. This is not a case, therefore, in which the existence of such injustice has been established, as to call for a new trial."





## CHAPTER V.

### BY REASON OF A VOID VERDICT.

It is a general rule, that if the finding of the jury be contrary to the record on the matter agreed to by the parties, or out of the issue, or of only part of the issue, or imperfect, uncertain, argumentative, repugnant, or variant from the declaration, it will be avoided, and a *venire facias de novo* or new trial will be awarded.

1. If the jury find contrary to the record, the verdict is void.(1)

So the rule was laid down in *Goddard's* case,(2) which was this: Goddard, administrator, brought an action of debt upon a bond made to the intestate. The defendant pleaded that the intestate died before the date of the bond, and so concluded that the said writing was not his deed, upon which they were at issue. The jury found that the defendant did deliver it as his deed, and that he died before the date of the bond, and prayed the advice of the court, whether this was the defendant's deed; and it was adjudged by *Anderson*, Ch. Justice, *Windham*, *Periam* and *Walmesly*, that it was his deed. The reason of their judgment was, that although the obligee in pleading cannot allege the delivery before the date, because he is estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth; and therefore jurors cannot be estopped, because they are

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(1) 2 Rol. 691.

(2) 2 Co. 4.

sworn to say the truth. But if the estoppel or admittance be within the same record in which the issue is joined, upon which the jurors shall give their verdict, there they cannot find any thing against that which the parties have affirmed and admitted of record, although the truth be contrary; for the court may give judgment upon a thing confessed by the parties, and jurors are not to be charged with any such thing, but only with things in which the parties differ.

The rule was afterwards recognised in *Mackalley's* case,(1) which was much debated on several points. One of which was, that the verdict was repugnant as finding a fact, both according to, and in opposition to the record, which was answered by the court. "The jury cannot find any thing against the record itself."

The reason of the rule is, it is matter agreed on by the parties, which the jury cannot be permitted to disregard.

This is well illustrated in the following case from *Dyer*.(2)

The plaintiff declared in debt that he demised twenty-six acres of land to the defendant, and for rent arrear he brought the action. The defendant pleaded that the plaintiff leased the said twenty-six acres of land to him, and four acres more; *without this*, that he demised the twenty-six acres only, upon which they were at issue. The verdict was, that the plaintiff demised only twenty-one acres, and whether the plaintiff should have judgment upon this verdict or not, was the question. *Fitzherbert* and *Englefelde* thought that the plaintiff should recover, for in that the verdict found that the plaintiff demised twenty-one acres only, it is a void verdict in this part; for it is admitted and confessed on the part of the defendant, that

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(1) 9 Co. 69.

(2) 1 Dyer, 29.

twenty-six acres were demised as he declared ; and they ought not to find contrary to what the parties have agreed. Their charge was no more, than whether the four acres more were leased, or not, and they have not found that the four acres more were demised ; therefore they have found against the defendant. *Baldwin and Shelley, e contra.* For the issue is found as well against the plaintiff as against the defendant ; for the plaintiff has laid the cause of his action upon a lease of twenty-six acres, and upon that he intends to recover. But *Shelley* thought that if the issue and the plea had been well pleaded, the plaintiff might have recovered upon the verdict. But the plea is not good, because it is not necessary for the defendant to take a traverse in this case, inasmuch as he hath confessed it, and more, and then the traverse should come from the part of the plaintiff. Which opinion was afterwards affirmed by the court.

So, in dower, if the tenant pleads always ready to render dower, and the issue is whether the husband died seised, the jury shall not inquire whether he was seised of an estate of which the wife was dowable, for this is confessed by the plea.(1)

And in assize, if the tenant pleads that the demandant took the profits *pendente lite*, the jury cannot find that the tenant was not seized ; for it is admitted by the plea.(2)

So, if a tenant justifies for common and issue on the common found for the demandant ; the jury cannot find that the tenant did not put in his cattle.(3)

So, in an *Anonymous* case.(4) Assumpsit against two, and there was judgment by default against one of them ; the other pleaded payment in satisfaction of the whole debt, but at the trial proved only payment of his share ;

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(1) 3 Leon. 80.

(2) 2 Rol. 691.

(3) 2 Rol. 692.

(4) 3 Salk. 372.

and per *Holt*, Ch. J.—“ If the jury find a discharge only as to this defendant, they must find for the plaintiff, and so they must, though they find the payment was for the whole debt; because the other defendant hath confessed the action, and the finding of the jury cannot discharge him, which was done accordingly, and small damages given.”

2. If the verdict find a matter entirely out of the issue it is void.(1)

Thus in *Baker's case*.(2) The plaintiff declared in case, that the defendant was indebted to W. R. in £40, who became a bankrupt, and that the commissioners assigned £40 to the plaintiff, whereby the defendant became indebted to the plaintiff in £40, and being so indebted promised to pay; and upon the evidence, the jury found the defendant was indebted to the bankrupt in £30 only, so that the sum of £40, for which the plaintiff had declared was never assigned to him, nor promised to be paid. But adjudged, “ that it was no worse in the plaintiff, than if the bankrupt himself, before he became bankrupt, had brought the action; and the difference is between an action on a promise in law, as in the principal case, and an action brought upon the contract itself; for, in the first case a mistake in the sum doth not hurt, but in the other case it doth.”

So, in an action on the case for words, upon not guilty pleaded, the jury found that the defendant *non locutus est verba*, &c., and adjudged ill.(3) The verdict ought to have pursued the issue, and for that reason it was held to be void.

So, in trespass, upon not guilty pleaded, the jury found that the plaintiff *non damnificatus fuit*, and held ill, be-

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(1) *Hob.* 53.

(2) *Allen*, 28.

(3) *Sid.* 234.

cause it doth not answer the plaintiff's charge.(1) So in assumpsit, and non assumpsit pleaded, the jury found, that the plaintiff was damnified £10 by the defendant's not performing his promise ; this is ill, because it doth not directly answer the issue, but by implication.(2)

So, if debt be brought for £20, and the verdict be, that the defendant owes the plaintiff £40, the plaintiff shall not have judgment, for it cannot be the same contract which is entire.(3) So, if a man bring an action of debt, and declares for £20, and the jury, upon *nil debet* pleaded, find that the defendant owed £40, this is ill ; for the plaintiff cannot recover more than he demands, and in this case he cannot recover what he demands, because the court cannot sever their judgment from their verdict.(4)

But the modern practice is to enter a remittitur on the record of the excess, which cures the verdict and makes the judgment valid.

Therefore, if the jury find a direct verdict upon the issue, and also something beyond it, the latter will be rejected as surplusage, and will not be allowed to vitiate the verdict, conformably to the maxim *utile per inutile non vitiatur*.(5)

In *West v. Monson*,(6) in an assize against West, he pleaded he was not tenant of the freehold named in the writ, and also there was no tort. The jury found that the plaintiff below was disseised by the defendant, as was alleged in the writ, unless certain provisions in the will of Robert Monson, which they set forth in *hæc verba*, conveyed a good estate in the lands to the defendant below, and therefore prayed the advice of the court. Judgment was given for the plaintiff, and error brought, upon the ground that the verdict was imperfect, not finding the tenancy of

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(1) 3 Salk. 373.

(2) Yelverton, 78.

(3) 2 Rol. 702.

(4) 3 Salk. 376.

(5) Hob. 54.

(6) Cro. Eliz. 490.

the freehold; and that the finding as to the will was out of the issue. And all the justices besides *Gawdy* resolved, that the verdict was found for the plaintiff; and that which came after the *nisi*, being imperfect, was idle and void, and judgment should be given upon the precedent verdict; and held the verdict being perfect before, that which comes after the *nisi*, being idle and void, shall never hurt it, but judgment shall be given upon the verdict which is good.

The rule has been illustrated thus:—If the issue be, whether A. and B. enfeoffed, if it finds that A. and B. did not enfeoff, but that A. alone enfeoffed, the last clause is void.(1) So, a verdict, that an executor, *administravit vel ad usum proprium disposuit* is good, though in the disjunctive, and one way had been sufficient. So, if it finds the prescription alleged, it is good, though it finds more.(2)

In *Richmond v. Tallmadge* in error.(3) Action of debt against the sheriff on an escape of one Brockway. The special verdict stated, that Brockway, who had been admitted to the gaol liberties, after leaving the limits, voluntarily returned and was on the limits of the county of Cayuga, at the time of the commencement of the suit, but that the defendant below had not accompanied his plea with an affidavit, that the escape was without his knowledge or consent, nor filed any such affidavit. The jury further submitted, that if it should seem to the court that the defendant owed to the plaintiffs the debt, or any part thereof, then they found that the defendant owed the plaintiffs 5,294 dollars and 24 cents, parcel of the said debt. The judgment was entered generally, that the plaintiffs recover their debt and damages aforesaid.

It was insisted, on the part of the plaintiff in error, that

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(1) 2 Rol. 706.

(2) Hob. 49.

(3) 16 Johns. Rep. 307.

the judgment of the supreme court ought to be reversed, because the jury had found the voluntary return of the prisoner before suit brought, which was a full defence to the action, although no affidavit had been filed, and for the variance between the judgment and verdict.

The *Chancellor*, in delivering his opinion, which prevailed, after commenting upon the case, concludes thus: "The fact found by the jury, that the plea had no such affidavit, was a finding not within the issue before them. The jury had nothing to do with the question, touching the legal requisites of the plea. That was a matter exclusively for the court. If the jury find more than is contained in the issue, that excess is to be *rejected as surplusage*. The case is then reduced to this point, whether to an action of escape, a plea of a voluntary return by the prisoner within the liberties, before suit brought, and that plea certified by the jury to be true in point of fact, be not a valid defence? Under the decisions of this court, there can be no doubt of the validity of such a defence; and I am therefore of opinion, that the judgment of the supreme court ought to be reversed."

So, in *Roane v. Drummond*.<sup>(1)</sup> Verdict for the plaintiff £50, that being the debt in the declaration mentioned, and \$60 in damages. The judgment was rendered for those two sums; and afterwards, upon an appeal, it appeared that the debt in the declaration mentioned was £50, &c. The court of appeals was of opinion, that the verdict found in substance that the debt mentioned in the declaration had not been paid, as alleged by the plea; and the only incongruity was, in stating it to be £50, which was surplusage. The finding was sufficient to have justified a judgment for the debt in the declaration mentioned, and the \$60 damages. And in this view of the case, the error being

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(1) 6 Randolph, 182.

in favour of the defendant, could not be complained of by him.

And in *Bacon v. Callender*.<sup>(1)</sup> Action of *entry sur disseizin in the post*, in which the demandant demanded six undivided seventieth parts of a messuage and land in Boston, and counted on her own seizin within thirty years, and on a disseizin by one Lemuel Cox, after which the tenant entered. Plea the general issue, and before a verdict was taken, motions were filed, according to the practice of the court; upon which the jury found for the demandant, and likewise the increased value of the premises, which had not been given them in charge, and formed no part of the issue. The counsel for the demandant now moved for a new trial, because the jury had, in their verdict, found the increased value, whereas the tenant, and those under whom he claims, had not claimed to hold the demanded premises by virtue of a possession and improvement thereof, but had claimed the same, under the same title under which the demandant claimed to hold them, viz.—the deed of one William Lowder, and therefore the jury had no legal authority under the statute to inquire into the value of the premises, whether improved or unimproved. But the court held, that if this position was correct, the extrajudicial finding of the jury was no cause for a new trial, as it must be considered as surplusage, the jury having found the issue, which depended on facts wholly unconnected with the value of the premises, whether that value was increased by the tenant's improvements or not, and that on this part of the verdict, judgment might be entered."

So, if the jury, travelling out of their province, undertake to liquidate or award the costs, as in *Lincoln v. Hapgood*.<sup>(2)</sup> Verdict for plaintiff, \$5. The counsel for the plaintiff moved that a new trial should be granted, because

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(1) 6 Mass. Rep. 303.

(2) 11 Mass. Rep. 358.



of the smallness of the damages assessed by the jury. They argued that the jury, having expressed in their verdict, that the plaintiff should have full costs, although such expression could have no legal effect or operation; yet that by rendering judgment for the plaintiff for five dollars damage and one fourth of that sum as costs, the real intentions of the jury, in finding their verdict, would be wholly counteracted and frustrated, if the verdict were permitted to stand. Instead of affording him compensation for the injury he had proved himself to have suffered, such a judgment would be a severe penalty upon him for seeking his legal remedy. But *Per Curiam*.—"The jury went out of their province in awarding costs for the plaintiff. That part of their verdict is merely void."

A similar rule prevails in the courts of this state, where the costs are given by statute.(1) As often as jurors have ventured out of the record upon the question of costs, which has been not unfrequently, they have been reminded that it is a subject, which the law has placed out of their province, depending wholly upon the nature of the action, and the amount of their verdict.(2)

3. If the jury find only part of the issue, judgment cannot be entered on the verdict. It is void for the whole, and a *venire de novo* will be awarded.

It is thus laid down by Lord Coke :—"A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion be brought against one, for intruding into a messuage and one hundred acres of land, upon the general issue, the jury find against the defendant for the land, but say nothing for the house, this is insufficient for the whole, and so was it twice adjudged."(3)

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(1) *Vide* Gra. Prac. 574. (2) 1 Cowen, 160. (3) Co. Litt. 227

In *Miller v. Trets*,<sup>(1)</sup> Information was exhibited against the defendant, by the plaintiff in the court of exchequer, for selling lace and silks. Upon issue joined, the jury found the defendant guilty as to selling the lace, &c., but said nothing as to the silks, and judgment for the informer. Upon error brought, this omission of the jury in the verdict was assigned for error. A motion was made for leave to amend; but denied, because it was not amendable, and therefore the judgment was reversed.

In *Rex v. Hayes*,<sup>(2)</sup> the court held that if a jury finds but part of the matter put in issue, and says nothing as to the rest, the verdict is ill, and a *venire facias de novo* shall issue, if no judgment is given; but if judgment is given upon such verdict, shall be reversed. So, if a special verdict is imperfect, and do not take in the whole issue, a *venire facias de novo* shall be granted, or if the special verdict is such that no judgment can be given upon it.

So, in *Cattle v. Andrews*,<sup>(3)</sup> in error, on a judgment in trespass, wherein the plaintiff declared against the defendant for several trespasses, viz. for breaking and entering his close, treading down his grass, and taking and carrying away water. The defendant justified as to all upon which they were at issue, and the jury found him not guilty as to the *treading*, but gave no verdict as to the other matters. This was adjudged naught, and for this cause the judgment was reversed.

And where the defendant was indicted for a forcible entry and detainer, the jury found the entry peaceable, but said nothing as to the *detainer*; but if they had found the entry peaceable, and the detainer by force, it had been good.<sup>(4)</sup>

So, in assault and battery by husband and wife. Up-

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(1) 1 Lord Raym. 324.

(2) 2 Lord Raym. 1518.

(3) 3 Salk. 372.

(4) Ibid. 374.

on *not guilty* pleaded, the jury found that the defendant was guilty as to beating the wife, and nothing was said of the husband. It was held that the verdict was void, because only part of the issue was found.(1)

And in *Auncelme v. Auncelme*,(2) in an action of trespass to try a title to certain copyhold lands, the jury found a special verdict *quoad parcel tenementorum*, but they did not show what parcel; and they found nothing for the residue. Therefore the verdict was held to be ill for both, and a *venire facias de novo* awarded.

With this agrees the practice in this state. The defect is to be cured only by setting aside the verdict, or reversing the judgment. In *Van Benthuysen v. De Witt*,(3) in error. The action was debt on bond. The defendants below pleaded *non est factum*, and performance of the condition. The plaintiffs replied, setting forth a breach, and issue was joined thereon. The verdict was taken upon the first issue only, by which the jury found that the bond was the deed of the defendants, and they assessed damages by reason of the detention of the debt to one cent, besides the costs and charges to six cents. A judgment was given thereon for the debt and costs. The case was submitted to the court without argument. The question was, whether it is not error to enter a judgment for the debt, before the jury have passed upon the second issue, and if found in favour of the plaintiff, until they shall have assessed damages for the breach assigned. The court, after commenting on the defect as to the jury assessing the damages for the breach, conclude: "In the present case there is this further defect, that the jury have not passed at all upon the second issue. We are accordingly of opinion that the judgment below

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(1) Hard. 166.

(2) Cro. Jac. 31.

(3) 4 Johns. Rep. 213.

must be reversed, and that a *venire de novo* be awarded.”(1)

Thus also, in *Brown v. Henderson*,(2) in the supreme court of appeals for Virginia. This was an action of debt against the appellant upon a bond of his testator. He pleaded payment by his testator and *fully administered*, on which pleas issues were joined. The jury found a verdict “for the defendant, he having *fully administered* all the assets of his testator, which came into his hands to be administered.” Judgment thereupon was rendered for the defendant. But upon appeal it was reversed, and a new trial awarded in general terms, by the district court, upon the ground “that the issue upon the plea of payment in the record set forth had not been tried. From this judgment the defendant appealed. It was contended that the verdict was sufficiently responsive to both issues; being equivalent to a general finding for the defendant. But the court thought otherwise, and affirmed the judgment.

So, in a criminal case, in *South Carolina. The State v. Bunten*. The defendant was indicted for stealing a cow and a calf. There was no evidence with regard to the calf: the jury nevertheless found a general verdict of guilty; and on a motion for a new trial the court say:—“It would be sufficient in this case to say, that the question has already been decided in the case of *The State v. ————*. The defendant in that case had been indicted for stealing two cows. It was abundantly evident that he had stolen one, but there was no proof against him as to the other. The jury however found a general verdict. The next day it occurred to the solicitor, that the verdict was wrong, as the defendant stood convicted of stealing two cows, when in fact there was no evidence that he had

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(1) Vide 2 Hall's Rep. 211.

(2) 4 Munf. 492.

substant but one. He therefore moved the court to permit the jury to amend their verdict, so as to correspond with the testimony, which motion was granted. But on a motion in this court, it was held that the court below had no power to amend or alter the verdict, after the jury had separated ; and a new trial was granted." And the opinion concludes by directing a new trial by all the judges unanimously.(1)

In *Patterson v. The United States*.(2) Debt on bond with a penalty. Plea, performance. Verdict, "that the within mentioned writing obligatory is the deed of the within named Robert Patterson, and they find there is really and justly due upon the said writing obligatory, the sum of \$23,989 58." Upon this verdict, the court gave judgment in favour of the United States for \$35,000, to be released on the payment of the above sum assessed by the jury, from which judgment a writ of error was obtained to remove the cause to this court. In delivering their opinion in affirmance of the judgment, the court observe : "The issue which the jury was sworn to try was, whether the certificate and other proofs required by law, of the delivery of the cargo at some place without the limits of the United States, were produced at the collector's office at Baltimore, within one year from the date of the bond. The verdict does not find the matter in issue one way or the other, but finds that the bond in the declaration mentioned is the deed of the defendant, and that there is justly due to the United States upon the said bond, a certain sum of money. But whether the bond was the deed of the defendant or not, was not a matter in issue between the parties, and consequently it was a false conclusion to say, that because it was his deed, therefore he was indebted to the United States. The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial

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(1) 2 New & M'Cord, 441.

(2) 2 Wheat. 221.

matter, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

4. If the verdict be defective or imperfect, so that no judgment can be entered on it, it will be set aside.

In *Cook v. Loveday*, in the exchequer, the defendant pleaded to issue in an information upon the statute of usury, the jury found that, as to the corrupt agreement in the same information specified, the defendant was guilty, and that he took the profits for performance of that corrupt agreement; but it was not found that he lent the money, as alleged in the information. For this cause it was resolved, that the verdict was void, and that it should be taken by intendment that it was lent. Wherefore a *venire facias de novo* was awarded. At the second trial the plaintiff was nonsuited, whereupon a writ of error was brought. The first error assigned was, that the verdict was well enough, so that there ought not to have been a new trial; but the court held clearly the verdict was imperfect, for the reason aforesaid.(1)

So, in *Langley v. Payne*. An action was brought against husband and wife. The jury found the wife not guilty, and a special verdict as to the husband; which special verdict was afterwards adjudged insufficient by the court. A *venire facias de novo* shall be granted for both,

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(1) 8 Co. 65.

as well the wife as the husband ; and on this new writ the wife may be found guilty, because the record and issue are entire, and the verdict insufficient and void in whole.(1)

In *Hooper v. Shepherd*,(2) in error, on a judgment in debt on a charter party, whereby the defendant was to pay fifty guineas per month. And the plaintiff states that £652 10s. was due for the whole ; £152 10s. whereof he had received, and the remainder was £500, for which the action was brought. The defendant pleaded, that he has paid at the rate of fifty guineas per month for all the time the ship was in his service ; and issue being taken that he did not, the jury find that £357 11s. remained unpaid, but say nothing as to the rest of the £500. It was objected that this was an imperfect verdict, the jury not having answered to all they were charged with. The court therefore reversed the judgment.

So, in *Baugh's* case.(3) Action in debt, plea *solvit ad diem*, and issue thereon, and the jury found *quod debet*, it was adjudged ill, and a *venire de novo* awarded. So, in *Evet's* case.(4) The defendant pleaded *plene administravit*, and the jury found that he had goods in his hands, but did not find to what value, adjudged ill, because the plaintiff must recover according to the value of the assets found ; but if action of debt is brought against an heir and he pleads *riens per descent*, and the jury find that lands in fee descended to him, but not to what value, the verdict is good, because a general judgment shall be given, and not according to the value of the land.

In *Boraston v. Hay*.(5) In trespass ; the defendant pleaded a custom, &c. which, being traversed by the plaintiff, the jury found the custom specially, but variant from that which was pleaded, concluding their verdict *quod si*

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(1) Cro. Jac. 627.

(2) 2 Str. 1089.

(3) 2 Rol. 694.

(4) 2 Rol. 604.

(5) Cro. Eliz. 415.

*super totam materiam*, &c. they find the defendant guilty. *Si aliter*, &c. and then they find him not guilty. A *venire facias de novo* was awarded, because there was no verdict found upon this issue, there being no conclusion upon the point in issue.

In debt on bond with a penalty, and damages assessed, if there is verdict for plaintiff that defendant owes the debt and one shilling damages, a *venire facias de novo* shall go, for jury should have assessed the real damages on the breaches assigned, and plaintiff cannot take a verdict for the whole debt.(1)

So, in *Kegwin v. Campbell*.(2) Action of trespass committed on land. Plea that *Joseph Campbell*, one of the defendants, was seized and possessed in fee of the land on which, &c. This being traversed, the jury found that the defendant was not seized, &c. On motion in arrest, because said verdict had not answered the issue, judgment was arrested, and a repleader ordered.

In *Smith v. Raymond*.(3) Action in trespass for cutting and carrying away timber, and defendant justified as servant of the owner in fee, and replication *inde* with a special traverse. The jury found, "that long before the date and impetration of the plaintiff's writ, one Luke Raymond, of Stamford, in said county, was well seized and possessed in his own right, in fee of the land and premises, in the plaintiff's declaration mentioned, on which the said trees were standing and growing ; and therefore find for the defendant his costs." Plaintiff moved in arrest, because the verdict found no material fact in issue, and the court, after repeating the verdict, remark, that whether, at the time of the license given to the defendant, or at the time of cutting the trees complained of, or at the date and impetration of

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(1) *Dradge v. Brand*, 2 Wils. 377.

(2) 1 Root, 268.

(3) 1 Day, 189.



the plaintiff's writ, the said Luke Raymond was seized and possessed of the premises, (which material facts were put in issue by the pleadings,) does not appear from the verdict; nor are they with any certainty to be inferred therefrom. The verdict of the jury is, therefore, defective, in that it does not find the material facts put in issue, and is wholly undecided as to the question of title, which the defendant, by his plea, took upon himself to establish.

And in like manner, if in the same contract the plaintiff counts severally on the contract as special, and also on a *quantum meruit*, and the jury find a larger sum than demanded in either count, the verdict will be set aside, for there is only one issue, and the plaintiff cannot recover on both counts. Thus, in *McIntire v. Clark*.<sup>(1)</sup> Action of debt. Articles of agreement were entered into, between the plaintiff and the intestate, whereby the plaintiff engaged to render his services, and make the necessary advances of money, to obtain possession of certain property, belonging to the intestate, in the Island of Jamaica, and to give such security for the faithful discharge of his agency, as should be approved by A. B. For his agency he was to receive compensation, to be liquidated in a manner pointed out in the agreement. Property to a considerable amount was recovered. The value of the plaintiff's services was certified at \$4817 84, and he brought this action to recover the amount thereof. The declaration demanded \$9635 68, and contained two counts; the first setting forth the special agreement, averring that the plaintiff had devoted time, services, and money to the business, and recovered a large estate for the intestate, and that he was ready and willing to give the security provided for, but no such security was required of him. It set forth the liquidation of his compensation at \$4817 84, and demanded that sum in

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(1) 7 Wendell, 330.

the first count. The second count was on a *quantum meruit*, demanding a like sum. The plaintiff had a verdict of \$7000. The defendants moved for a new trial, which was granted, principally on the ground, that the verdict was for a sum greater than was demanded in either count, and that he cannot recover on both.(1)

In *Triplett v. Micou*.(2) The action was brought against two obligors: it abated as to one by his death, the other pleaded payment; and the verdict was "that the surviving defendant hath not paid to the plaintiff the debt in the declaration mentioned." As the declaration charged, that both obligors were in default, and the plea of payment was general, the court of appeals was of opinion, that a payment by either defendant was within the issue, and therefore held that the verdict was defective, because it did not negative the payment of the money by the deceased obligor. The judgment which had been rendered for the plaintiff was reversed, the verdict set aside, and the cause remanded to the court below.

So, in *Fairfax v. Fairfax*.(3) Upon the issues of *non assumpsit* and *plene administravit*, the jury found a general verdict, which was recorded in this form. "We of the jury find the issues for the plaintiff, and assess the damages to two hundred and twenty dollars and ninety-five cents." Upon which verdict, the judgment of the court was, "that the plaintiff recover against the defendant her damages aforesaid, in form aforesaid assessed, and also her costs by her about her suit in this behalf expended, to be levied of the goods and chattels of the said Bryan Fairfax, deceased, at the time of his death, in the hands of the said defendant to be administered, if so much, &c.; but if he hath not so much, then the costs aforesaid to be levied of the proper goods and chattels of the said defendant." The

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(1) Vide Willes, 65. 5 Co. 22.

(2) 1 Randolph, 269.

(3) 5 Cranch. 19.

error relied upon by the plaintiff in error, was that the jury had not found the amount of assets in his hands to be administered.

*Marshall*, Ch. J., delivered the opinion of the court. "The verdict ought to have found the amount of the assets in the hands of the defendant to be administered. The cases cited to show that the judgment must be for the whole sum, if the verdict find any assets, have been overruled. The law is now well understood to be, that the executor is only liable for the amount of assets found by the jury. The defendant in error relies on the form of the issue. She contends that, as the replication alleges that the defendant has assets more than sufficient to satisfy the debt, the finding of that issue for the plaintiff below, is in effect finding, that the defendant has assets more than sufficient to satisfy the debt, and if so, it is wholly immaterial, what the real amount of the assets is. But if this were the issue, and the demand were 500 dollars, if the jury should find that the defendant had assets to the amount of 499 dollars, the judgment must be for the defendant. But the law is not so. An executor is liable for the amount of assets in his hands, and not more. The issue really is, whether the defendant has any, and what amount of assets in his hands." And judgment was reversed.

5. If the jury find a verdict in the alternative, or in terms so imperfect and uncertain that judgment cannot be entered upon it, the verdict will be set aside. "A verdict," says Lord Coke, "finding matter uncertainly or ambiguously, is insufficient, and no judgment shall be given thereupon; as if an executor plead *pleinment administre*, and issue is joined thereupon, and the jury find that the defendant have goods within his hands to be administered, but find not to what value, this is uncertain, and therefore insufficient." Thus if there is a

verdict for plaintiff, that defendant owes the debt and one shilling damages, a *venire facias de novo* shall go, for the jury should have assessed the real damages on the breaches assigned, and the plaintiff cannot take a verdict for the whole debt.(1)

In *Hambleton v. Veere*.(2) Action on the case for the loss of the service of an apprentice for the whole residue of his term of apprenticeship. The jury assessed damages generally, and judgment was arrested. Afterwards it was moved for the plaintiff that he should have judgment, because the damages assessed by the jury, were assessed only for the wrong by the defendant, in procuring the apprentice to depart out of his service, and not for the loss of service. But the court were unanimous in denying the motion, on the ground of uncertainty, remarking upon the case in terms illustrative of the rule generally. "That it is not ascertained by the verdict for what time the damages are assessed, unless for all the residue of the term, for they are assessed generally; and if they should not be intended for all the residue of the term, for what time shall they be intended? For a month, or two months, or until the exhibiting of the bill, or until the giving of the verdict? Certainly no one can say: and therefore the assessing of the damages is either bad, if they are assessed for all the residue of the term, or uncertain, if they are assessed for any other time.

In *Morrice v. Prince*, in error.(3) Action for a rent charge, where the defendant in error claimed for life under the will of Edward Prince. Verdict that the defendant in error was seized of the rent charge—had demanded it, and plaintiffs in error refused to pay, and thereby disseised defendant, and that there were arrears of thirty years and a half. And judgment was reversed on the ground that it

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(1) Co. Litt. 227. (2) 2 Saund. 171. (3) Cro. Car. 590.

did not appear by the verdict when the devisor died, and therefore the certainty, as to the ground of arrears, not ascertained.

In *Broome v. Rice*,<sup>(1)</sup> in trespass; the defendant justified under a distress for rent, and showed that he gave notice according to the act of parliament, had the goods appraised by persons sworn before the head borough, and sold, and the surplus left in the hands of the constable. The plaintiff replied *de injuria sua propria*, and there was a verdict for the defendant. But upon motion, the court set aside the verdict, and ordered judgment to be entered for the plaintiff, and a writ of inquiry of damages to issue; for by the defendant's own showing, the sale cannot be justified, it appearing there was a constable present, so that the head borough had no power to administer the oath.

In *Bishop v. Kaye*,<sup>(2)</sup> in error, the plaintiff declared in assumpsit for money lent and advanced. Plea that the promises were made by Bishop jointly with one Crowther. Replication that the promises were made by Bishop alone, and verdict that Bishop did undertake and promise in manner and form, &c. Plaintiff in error assigned for cause, that the jury merely found that the defendant did undertake and promise, without finding that he alone did undertake and promise. It was contended that the jury had found substantially, that the promise was made by the defendant below, alone and not jointly. And *per Abbott*, Ch. J., upon this point, I think that the judgment cannot be supported, for the verdict does not distinctly find the issue joined between the parties. *Bayley*, J.—I am of opinion, that the judgment must be reversed, upon the ground that the verdict does not distinctly pronounce upon the issue joined, between the

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(1) 2 Str. 573.

(2) 3 Barn. & Ald. 605.

parties. The declaration charges that the defendant promised. Now that allegation may be supported either by proof of a joint or separate promise. The defendant however pleads that he promised jointly with another. The issue to be tried was, whether he promised jointly or alone. The jury have found merely that he promised, without saying whether alone or jointly. The verdict therefore does not pronounce upon the only point in issue between the parties. It is necessary that it should be shown by the verdict, that the jury have taken into consideration the point in issue."

In *Pettibone v. Gozzard*,<sup>(1)</sup> Ejectment for two pieces of land. Plea, the defendant had done no wrong or disseisin, and verdict that the defendant had done wrong and disseisin to the plaintiff, as to one piece of the land particularly described in the verdict, and found for the plaintiff. But the jury, in their verdict, made no mention of the other piece of land. A motion in arrest was made, that the verdict ought to have answered the issue as to both pieces of land. By the court.—"The verdict must be an answer to the whole of the matters put in issue. The jury have found that the defendant had done wrong and disseisin as to a part of the land ; as to the other piece of the land, they are silent ; whereas they ought, by their verdict, to have answered that part of the issue."

In *Miller v. Hower*,<sup>(2)</sup> it was held by the supreme court of *Pennsylvania*, that a verdict in debt, finding no specific sum, must be set aside as being a void verdict, and that the defect could not be supplied by a writ of inquiry to assess the damages.

But where in an action of ejectment, the jury found a verdict for the plaintiff, and *that he should pay the defendant a just compensation for improvements*, the same court

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(1) 2 Root, 254.

(2) 2 Rawle, 53.

held in *Allen v. Flock*,<sup>(1)</sup> that the part of the verdict awarding a *just compensation* was uncertain, and therefore void; but intimated that it would not vitiate the part which was certain, the verdict being complete without it.

The same rule prevails in this state. In *Malin v. Malin*,<sup>(2)</sup> which was an action in ejectment, a question arose upon the attestation of a will; and among other things, the jury were charged whether the will had been altered after its execution, and by whom. The jury gave a verdict for the plaintiff, adding, "that the will had been altered by some interested person." The defendant moved to set aside the verdict, and for a new trial. After remarking upon other points taken in the case, *Platt, J.*, who delivered the opinion of the court, concludes: "In this case the judge properly directed the jury to find whether the will had been altered after its execution; and if so, by whom. I think the jury have not answered that question with sufficient certainty and precision. The verdict is, that the will has been altered by some interested person. The words, some interested person, do not necessarily designate Rachel Malin. Those words are as applicable to the lessor of the plaintiff as to the defendant. The verdict is uncertain on that point, and a new trial ought therefore to be granted."

So, if upon a special verdict, there has been uncertainty occasioned by a mistake in a material fact, as in *Jackson v. Cannon*.<sup>(3)</sup> The parties had, without trial, agreed upon a special verdict; and the plaintiff had agreed to a certain deed, to be produced by the defendant and made a part of the verdict, and an entry according to the deed, material to the question upon the statute of limitations, which arose in the cause. The argument upon the verdict had been several times noticed by the plaintiff, and at a previous term,

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(1) 2 Penn. Rep. 159.

(2) 15 Johns. Rep. 293.

(3) 2 Cowen 615.

it was argued provisionally, that the defendant should produce the deed afterwards, for the examination of the judges, as a part of the verdict. On its being produced, the lessor of the plaintiff discovered, as she alleged in her affidavit, that the description in the deed was broader than she originally supposed, and that the admission of the entry, according to this deed, was by mistake, and affidavits were read on both sides to the point of the alleged mistake. And *Per Curiam*.—"The verdict was drawn up and agreed upon without trial. The affidavits are conflicting as to the extent of the entry and claim, under this deed, which we perceive will be a material point of inquiry, in reference to the statute of limitations. The verdict being by consent, an amendment upon this motion, is out of the question. We amend those verdicts, where there has been a trial, upon which the facts have come under the view of the court and jury; but in such cases we have something to amend by. Here there is nothing. We cannot settle this case between the parties. We must either refuse our interposition entirely, or send the cause to a jury, and we are inclined to put the facts in a train for decision, by adopting the latter course."

So, in *Mirvan v Ingersol*.<sup>(1)</sup> On *certiorari*, it appeared, that in the court below, while the counsel for the plaintiff was engaged in drawing a special verdict, the defendant's witness appeared, and his counsel then asked leave to appear, and try the cause, stating that he could prove the truth of his plea. This was denied by the judge, and the plaintiff's counsel hastily drew a special verdict, in these words: "And the jury find that Thomas Ingersol does not appear, nor offer any evidence to prove the allegations contained in his plea." This was received and entered as the verdict of the jury. A motion was made to set aside

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(1) 3 Cowen, 387.



the verdict. The ground taken was that the verdict was void, and motion granted.

In *Blanks v. Foushee*,<sup>(1)</sup> on appeal. In this case the plaintiff declared on a promissory note and for money had and received. The jury found a verdict for the plaintiff, and assessed his damages to £243 16s. 4d. with interest until paid, subject to the opinion of the court, upon the operation of the law upon certain written documents and testimony, oral and written, set forth in the verdict, but without finding what facts were in the opinion of the jury proved thereby. And *Per Curiam*. "This court is of opinion that the said judgment is erroneous in this, that it is founded not on written documents and facts, found by the jury, and submitted to the court, for their judgment as to the law, but on the testimony, oral and written, of the witnesses reported by the jury, leaving it to the court, as well to infer the facts proved by the witnesses, (which the jury alone were competent to) as to decide the law arising thereon." And for this reason judgment was reversed and a new trial awarded.

In *Booth v. Armstrong*,<sup>(2)</sup> the plea set forth sundry judgments against the executor, and that he had not any goods of the testator except to a specific amount, which was insufficient to satisfy the judgments. The plaintiff replied that the executor had goods more than sufficient to satisfy the judgments, wherewith he might have satisfied the debt demanded. And there was a general finding for the plaintiff. The court of appeals was of opinion that the verdict was uncertain and insufficient, in not finding that the executor had goods and chattels which were of the testator at the time of his death, in his hands to be administered, more than sufficient to satisfy the judgments set forth in the plea, wherewith he could have satisfied the

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(1) 4 Munf. 61.

(2) 2 Wash. Rep. 301.

plaintiff's demand: or the value of the said goods and chattels, if not sufficient to satisfy the said demand. The judgment was therefore reversed, the verdict set aside, and the cause remanded to the court below.

So, in an action for freight and demurrage, where the jury rendered their verdict in these words, "we find for the plaintiff, and are of opinion that the plaintiff has already received out of property of the defendant payment in full for the amount of freight to which he is entitled," the verdict was set aside for the same cause.(1)

6. An argumentative verdict is void, and will be set aside on motion, and a new trial granted.

Thus if the issue be that a copyhold granted for three lives is heriotable; and the jury find that there never was any such grant in that manor, for it is not found directly that it is not heriotable, but only by argument.(2)

So, on an issue that by the custom a grant may be to three for the lives of two, a verdict that a grant for three lives is good, will be void, for it does not find the issue but upon the inference that, the grant of a less estate is good where the custom warrants a greater estate.(3) If the issue be, whether a copyhold may by custom be granted in tail, a verdict, that it may be granted in fee is void. So, in debt, on a special plea *non est factum*, for that the bond was read as an acquittance. Verdict, that he is lettered, and knew it to be a bond, and gave it voluntarily, is not good, for it ought to find directly that it is his deed.(4) And if the defendant pleads *solvit*, and issue is thereon, a verdict that the defendant owes the money is not good, for it finds only by argument *quod non solvit*.(5)

So, in trespass for taking and cutting his leather, the de-

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(1) 1 Serg. & Rawle, 367.

(2) 2 Rol. 693.

(3) Ibid.

(4) 3 Rol. 693.

(5) Ibid.

defendant justifies as a searcher, &c. and that he in searching it, cut it *more scrutatoris*. The plaintiff replies, of his own wrong *absque hoc*, that he cut it *more scrutatoris*; verdict that he cut it of his own wrong is not good, for it does not find the issue but by argument.(1)

In *Shelley v. Alsop*,(2) in an action on the case brought on a promise supposed to be made by the defendant, on *non assumpsit* pleaded, and tried in a base court in the town of Stafford, the jury found that the plaintiff, by non-performance of the promise *ex parte* of the defendant, had sustained damage 50s. and assessed costs, and judgment accordingly, and upon error brought thereon, it was reversed on the first motion, by *Fenner, Yelverton, and Williams*: "for the verdict given by the manner is no verdict, for they have not found the matter in issue, with which they were charged, viz: whether the defendant *assumpsit, necne*; so it is altogether uncertain and imperfect. For this finding by the manner, that the plaintiff has sustained damage 50s. by non-performance of the promise, is but a finding of the *assumpsit* by a *foreign implication*, which is not good on any general issue, no more than in trespass on *non cul.* pleaded; the jury find that the plaintiff is damnified £5 by the entry of the defendant; this is not good, for they ought to give their verdict precisely according to their charge."

These authorities are recognised in a recent case in a sister state, in *Gerrish v. Train*. Trespass *de bonis asportatis*. Plea, that the property of the goods, at the time of the taking, was in one Stevens, and not in the plaintiff; that the defendant was a deputy sheriff, and that he took the goods by virtue of a writ of attachment against Stevens, in favour of one Shattuck. Replication, that the defendant took the goods of his own wrong, traversing the property's being in Stevens, and concluding with a verifi-

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(1) 2 Rol. 694.

(2) Yelv. 77.

cation. Rejoinder, that the property was in Stevens, and concluding to the contrary, and issue joined thereon. Verdict, guilty, and the jury assessed damages. On motion for a new trial, on the ground that the verdict did not follow the issue, and was argumentative, a repleader was awarded; the court observing—"That the finding must be direct, and cannot be made good by inference. Thus if the defendant pleads *solvit* and issue is thereon. Verdict that the defendant owes the money, is not good, for it finds only by argument *quod non solvit*. So, in trespass, for taking and cutting leather, the defendant justifies, as a searcher of leather, &c.; and that in searching, he cut it *more scrutatoris*; the plaintiff replies of his own wrong *absque hoc*, that he cut it *more scrutatoris*; verdict that he cut it of his own wrong, is not good. In trover, on not guilty pleaded, the verdict was that the defendant converted the goods to his own use; and this was held bad, though equivalent to a verdict of guilty, by necessary inference."<sup>(1)</sup>

In *Gramvel v. Rhobotham*.<sup>(2)</sup> Action in trover. Plea, not guilty, and verdict for the plaintiff. Upon which error was brought, and plaintiff in error assigned, among other causes, because the issue being not guilty, and the jury not having found upon this issue, but only that the defendant detained and converted the goods to his own use, the verdict was void. And of that opinion was a majority of the court. But some of the justices were of opinion the verdict was amendable.

And there is little doubt, in conformity to the modern practice, such an amendment would now be allowed. It has long been well settled, that the courts will give validity to verdicts when they perceive the substance of the issue to be contained in the verdict, however rude or informal

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(1) 3 Pick. 124.

(2) Cro. Eliz. 865.

the finding of the jury may have been expressed. In the language of Ch. J. *Hobart*, "the court will work the verdict into form, and make it serve."<sup>(1)</sup> For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice.<sup>(2)</sup>

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(1) Vide *Hob.* 54. • *Co. Litt.* 227. 2 *Burr.* 698. 5 *Burr.* 2663.

(2) Vide 6 *Com. Pleader*, § 26. 30. 31. 32. and 33. 1 *Chit. Arch.* p. 310. *Gra. Prac.* 534. 536.

## CHAPTER VI.

### NEW TRIALS OCCASIONED BY ABSENCE, SURPRISE, OR MISTAKE.

THERE are other causes besides those already noticed, which, strictly speaking, do not enter into the merits, and yet deeply affect the result. The conduct of the party, his agents, and counsel, so far as it partakes of deceit, trick, or fraud, has been sufficiently adverted to, as well as the relief to which the adverse party is entitled by avoiding a verdict unfairly obtained. But there are other incidents connected with the conduct of the parties, apparently so unexceptionable, and yet so prejudicial to their rights, as to call for a similar relief. To have perfect justice done, it is necessary the parties and the counsel should carefully prepare for and duly attend upon the trial, and that the cause be conducted with knowledge, vigilance, and skill, in presenting the case, arranging the testimony, and improving the movements of the court and of the adverse counsel, to the advantage of the party. But it may sometimes happen, that the party and his counsel cannot attend, that when they do, notwithstanding all their vigilance, they may be taken by surprise, or suffer by mistake, or be misled by the suggestions of the court. And that by these and other occurrences, equally reconcilable with integrity and ability, their cause may be prejudiced and injustice done. To obviate this, when a clear case is presented, the courts will correct the evil, by setting aside the verdict. But they will as invariably refuse to interfere, where the cause suffers through the negligence of the party, or the inattention and incapacity of the counsel. This general principle may be distributed into minor rules with their

corresponding examples, illustrative of the modern practice granting new trials in cases of *absence*, *surprise*, or *mistake*, and refusing them by reason of negligence or mismanagement.

1. When the party or his counsel are absent through misapprehension or necessity, and the cause goes to the jury undefended, and there are merits, the court will relieve by setting aside the verdict.

In *Rex v. Roberts*.<sup>(1)</sup> The defendant having traversed an inquisition, whereby he was found to be a lunatic, the attorney-general filed the common replication; and it was sent from the petty-bag office to the king's bench. The prosecutor of the commission made up the record and carried it down to trial. Roberts, being ill, did not appear, and no defence was made, and the jury found in favour of the inquest. Upon this a new trial was moved for upon two points. The second point was upon the illness of Roberts, who could not attend, and which was made out by affidavits. The court thought it reasonable to grant a new trial for this, upon the foot of accident, and because the lord chancellor and the former jury had both had an inspection, which might be of great use to a second jury, who otherwise would be left to judge upon less evidence than the others had, and a new trial was granted.

So, in *Ten Broeck v. Woolsey*.<sup>(2)</sup> In *scire facias*, to revive two judgments, inquests had been taken. Motion to set them aside on affidavits stating, that the defendant lived at a great distance, had been discharged under the insolvent law, which fact was noticed under his plea. The attorney had written, urging him personally to attend, and was answered, that in consequence of a fractured leg, he

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(1) 2 Str. 1203, and Mod. Cas. 22.

(2) 3 Caines, 100.

could not travel, and wishing an adjournment of the cause. He did not attend, the causes were not adjourned, and inquests were taken. And on motion to set them aside on these facts, the court observed—"In this case the defendant lives remote, and was, from that circumstance and infirmity, prevented from attending to these suits at an earlier period. The moral obligation under which the defendant is supposed to labour, of paying his debts, is not to operate with the court, unless a new liability has been incurred. From the misconception of counsel, the remote distance of the defendant, his infirmities, and his having a meritorious defence, the court grant the application, upon payment of costs."

So, in the absence of counsel, in an *Anonymous* case, a new trial was granted because the counsel were absent, not thinking the cause would come on, and no defence was made.(1)

In *Beazley v. Shapleigh*.(2) Cause shown against a rule obtained on the behalf of the defendant, for a new trial, on affidavits by defendant's attorney and another person, stating that the cause stood No. 17 in the paper—that No. 14 was a question of right of way, and expected to occupy considerable part of the day—that the solicitor having new matter to add to his briefs was at home, making the necessary additions, when the cause was called on, as it had been in his absence, in consequence of having been taken out of course, No. 14 being postponed till next day; and that a verdict of damages was found for the plaintiff. The action was case on a warranty of an unsound horse. Under the particular circumstances the court made the rule absolute.

In *Peebles v. Ralls*.(3) It appeared that Peebles was not present at the trial, and his motion for a new trial was

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(1) 2 Salk. 645.

(2) 1 Price, 201.

(3) 1 Littell, 24.



grounded on an affidavit stating that on Tuesday, the day before the trial was had, the daughter of Peebles was at the point of death, in Bath county, so that he could not leave her to attend to the suit, and procure a continuance ; that Robert Marrow, John Peebles, jun., Jared Erwin and George Hawkins, (all of whom were summoned as witnesses a reasonable time before the trial,) were material witnesses for him in his defence ; that said Jared Erwin, owing to the sickness of his wife, could not attend ; that said Marrow could not attend, owing to his having an appointment to execute a survey ; that John Peebles, jun. was in Fleming county, and could not attend owing to high waters. *By the Court.* " If in his affidavit Peebles has shown a sufficient apology for not attending the trial, and failing to apply for a continuance, a new trial should most indisputably have been awarded ; for he has not only shown that he had, previous to the trial, exercised proper vigilance in causing his witnesses to be summoned, but he has moreover alleged in his affidavit, the materiality of their evidence for his defence, and given satisfactory reasons for their failure to attend the trial. That Peebles has made out a good excuse for his non-attendance at the trial, and not causing an application to be made to the court for a continuance, is equally clear. It is no doubt incumbent on all suitors to be vigilant in preparing and attending on the trial of their causes ; and after a verdict against any, his negligence should never form a ground for overturning the verdict and awarding a new trial. A new trial should therefore have been awarded."

So, in *Sayer v. Finck*.<sup>(1)</sup> Motion to set aside the inquest taken in this cause, on an affidavit by two persons, that the debt for which the action was brought had been paid, and on another affidavit by the defendant's

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(1) 2 Caines, 336.

attorney, stating, that he did not attend when the cause was called on, because from a conversation with the partner of the plaintiff's attorney, and who he thought was attorney also for the plaintiff, he was led to imagine the trial could not be had on that day, as there were eighteen prior causes on the day docket, and that the plaintiff's attorney himself would not attend. *Per Curiam*—"Let the inquest be set aside on payment of all costs. The court grant this only under the peculiar circumstances of the case. It appears that the defendant's attorney thought he was conversing with a person who was acting as attorney for the plaintiff. This belief might easily be induced from this circumstance, that the attorney on record, and the person spoken with were in partnership. It was, however, but an opinion of the adverse attorney that the cause would not be heard. We shall in future expect more explicit reasons for thinking a cause will not be brought on. The affidavit of merits is very strong. Taking this together with the misapprehension of the defendant's attorney, that the partner of the plaintiff's attorney was absolutely concerned in the suit, are the grounds of our present determination."

So, in *Sherrard v. Olden and others*.<sup>(1)</sup> The cause had been marked for trial, and regular notice had been served on the attorney of the defendants. Neither of the parties defendant, however, attended the court, and when the cause was called on for trial, the counsel for the defendants applied for a postponement, upon an affidavit that Gardener, one of the defendants, was sick in Philadelphia, and that James M'Corkle was a material witness for the defendants, that he had sailed for the East Indies in the month of June preceding, and before the cause was at issue, but was expected to return, &c. Not-

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(1) 1 Halst. 344.

withstanding this affidavit, however, the court ordered on the trial, and no further opposition being made by the defendants, a verdict passed for the plaintiff for £800. A rule had been obtained to show cause why a new trial should not be granted. *Per Curiam*—"At the trial of this cause the request for postponement was refused, not because there did not actually exist sufficient reasons to warrant the court in putting it off, but because sufficient grounds did not appear. It was not yet shown that the defendants had used due diligence. But we now know that the reason why these matters were not proved was, that one of the parties lay sick in Philadelphia, and the other, who resided in Princeton, was unable to attend. That each was ignorant of the situation of the other. That they did what, under the particular circumstances in which they were placed, it was reasonable to require of them, and that no exertions on their part would have availed to bring M'Corkle, who is sworn to be a material witness, to the trial. Considering therefore all these circumstances, that the defendants have been guilty of no laches, but that a verdict has gone against them for a large amount in an action to which they swear they have a good and substantial defence, we think the interests of justice require that they should have an opportunity to try the question upon its merits by another trial."

But if the absence be occasioned by neglect, or not satisfactorily accounted for, the court will not grant a new trial. Thus:—

In *Breach v. Casterton*.<sup>(1)</sup> The cause was undefended, and a verdict having been found for the plaintiff against one of the defendants, and a verdict in favour of the other three, *Taddy*, sergeant, obtained a rule *nisi* for a new trial, on payment of costs, upon an affidavit that the

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(1) 7 Bingham, 224.

defendant's attorney had been obliged to go to Ireland, and that in his absence the cause had, through the inattention and misconduct of his clerk, been called on as an undefended cause, although there was a good defence on the merits. *Wilde*, sergeant, who showed cause, objected that before the motion could be made, the consent of the three defendants in whose favour the verdict had been given, ought to be shown ; and that they ought not to be put to the inconvenience of a new trial on account of the attorney's neglect. *Per Curiam*—"If we were to make this rule absolute, every cause might be tried, twice over, as defendants would lie by to speculate on the amount of the first verdict. We have this term decided against such an application."

*In Masters v. Barnwell*.(1) Action for crim. con. The case came on and a verdict was taken for the plaintiff—no one appearing for the defendant. An application was made for a rule to show cause why a new trial should not be granted, on affidavits setting forth a number of instances of violence on the part of the plaintiff. It was alleged that he followed the defendant from England to France, from France back again to England, thence to Brussels ; that in the latter place, (the defendant and the plaintiff's wife living there together,) the plaintiff instituted criminal proceedings against the defendant for the adultery ; that the defendant had been sentenced to six months imprisonment ; that he had been repeatedly challenged to fight the plaintiff, and that by these, and by a variety of other proceedings of the same sort, by which he was kept in fear of his life, he had been prevented from giving proper instructions to his attorney ; and that if he had not been so prevented, he should have been able to present to the jury a case that would at least have reduced, in a material degree, the amount of the

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(1) 7 Bingham, 224, *in notis*.

damages. Affidavits were produced to resist the motion, and the hardship of the case urged. But the court thought it was plain the defendant had ample time to consult with his attorney, while he was confined in prison; that the charge against him was of the most aggravated nature, and that it would lead to the worst results if a party could lie by, take the chance of a judgment by default, and then demand a trial in the hopes of better success; and denied the motion.

The same practice obtains in this state. In *Post v. Wright*.(1) An inquest had been taken in the cause. A motion was now made to set it aside, on two affidavits, one from the counsel, who stated that he was counsel for the Humane Society of New York, and in that capacity, obliged to visit the gaol on Monday in every week; that this cause being noticed for trial on a Monday, he came into court instantly after discharging his duty to the society, when he found an inquest had been taken in the suit; that he on the same day wrote to the attorney of the plaintiff, offering to pay all costs of the inquest, and to engage to try the cause in the then sittings, if the plaintiff would abandon his inquest, which he refused to do. The hardship of the case was urged; but *Per Curiam*—"All reasonable notice to attend and defend the suit was given. The cause was on the day docket, and there is no kind of excuse why the defendant was absent. He had a counsel in court, and might have been there himself, with his witnesses. The defendant, therefore, can take nothing by his motion."(2)

2. Where a party or his counsel are taken by surprise, whether by fraud or accident, on a material point or circumstance, which could not reasonably have been antici-

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(1) 1 Caines, 111.

(2) Et vide 2 Caines, 379. 384.

pated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial will be granted.

So ruled in an early *Anonymous* case. If there be a fault in a declaration on which the plaintiff must be nonsuited, and the defendant taking notice of it, do prepare no defence for the trial, but depends thereon, and the plaintiff amends his declaration without rule for so doing, and so surprises the defendant and gets a verdict, the court will set such verdict aside and will grant a new trial.(1)

In *Edie v. East India Company*.(2) Action on two bills of exchange, and one indorsed without adding the words *or order*. The defendants accepted both bills, but refused to pay after insolvency of the payee. The jury found a verdict for the defendant on the bill indorsed without the words *or order*, apprehending that by the usage of merchants it was not assignable. A motion for a new trial was principally put upon the plaintiff's surprise, not being prepared to give evidence of the custom of merchants, as mere matter of opinion. Lord Mansfield, in delivering his opinion, observed—"Upon the best consideration I have been able to give this matter, I am very clearly of opinion, that at the trial I ought not to have admitted the evidence of usage. But the point of law is here settled, and when once solemnly settled, no particular usage shall be admitted to weigh against it. This would send every thing to sea again. It is settled by two judgments in Westminster Hall, both of them agreeable to law and to convenience. Upon this ground, that the point is settled both by king's bench and common pleas, and well settled, I think there should be a new trial, otherwise also I should be of the same opinion. Certainly the suggestion

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(1) 2 Show. 154.

(2) 1 W. Black. 295.

of surprise is not in all cases a reason for a new trial ; but in particular cases such as the present, it may be."

In *Thurtell v. Beaumont*.<sup>(1)</sup> On affidavits, proving a clear case of surprise, by the disclosure of a conspiracy, a new trial was granted. It was an action of assumpsit on a policy of insurance against fire. The defence set up was, that the plaintiff had wilfully set fire to the premises. Positive testimony was adduced, and inconsistencies were pointed out in the plaintiff's evidence, tending to substantiate this charge. The learned judge directed the jury, that before they gave a verdict against the plaintiff, it was their duty to be satisfied, that the crime of wilfully setting fire to the premises was as clearly brought home to him, in this action, as would warrant their finding him guilty of the capital offence, if he had been tried before them on a criminal charge. The jury found a verdict for the plaintiff. But on affidavits being produced from a respectable warehouse-man, and from Joseph Hunt, (who, together with John Thurtell was a prisoner in Hertford jail on a charge of murder,) showing that the plaintiff's demand had been supported by a tissue of unparalleled and audacious fraud, the circumstances attending which, although he vehemently suspected them, the defendant had no means of unravelling till after the trial ; so that with regard to the plaintiff's case, he was in effect taken by *surprise*. And the court, on this ground, granted a rule *nisi* for a new trial.

So, where upon the plaintiff's evidence, the judge intimates a strong opinion in favour of the defendant, upon a point decisive of the cause, and in consequence of such intimation, the defendant's counsel omits to call evidence in support of a different point, intended to be raised by way of defence, the court will direct a new trial. Thus in

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(1) 1 Bingham, 339.

*Le Fleming v. Simpson.*(1) Trover for oak trees. Plea not guilty. It appeared the defendants had carried away the trees with the intention to use them in a barn. The plaintiff endeavoured to show a custom for the lord to enter and cut and take timber for his own use; and the judge suggested, and called the attention of the jury to this custom, as the sole question. The plaintiff elected to be nonsuited, and the jury at the request of the judge found against the custom. A new trial was moved for, chiefly on the ground that the plaintiff's counsel had been prevented by the intimation of the court, from going into the question as to the plaintiff's right, by the custom of the manor, to take timber for building or repairs. And *Per Lord Tenterden*, Ch. J.—“If the counsel for the defendant states he was instructed to prove the right of the tenant, we take that from him, and grant a new trial.” The other judges concurring, the rule was made absolute.

So, in *Greatwood v. Sims.*(2) Action on a surety bond. A verdict at the sittings was found for plaintiff, the cause being undefended at the trial. The affidavit stated, that the cause was a long way off, and was called on, and the attorney not attending, it was undefended. That the defendant had a good defence, and was ready to pay the money into court. *Ellenborough*, Ch. J. granted a new trial on the terms that the money should be brought into court; that judgment should be given of the term, in case plaintiff again obtained a verdict; and that defendant should forthwith pay the costs of the former trial, and of this application.

And in *Ruggles v. Hall*,(3) where a material witness had been regularly subpoenaed by the defendant and attended at the circuit, and shortly before the cause was called

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(1) 1 Man. & Ryl. 269.

(2) 2 Chitty's Rep. 269.

(3) 14 Johns. Rep. 112.



on, absented himself without the knowledge or consent of the party or his attorney, and his absence was not discovered until after the jury was sworn, by which means a verdict passed against the defendant. By the *Court*—"The motion is for a new trial, upon the ground that a witness subpoenaed, and who had been attending on the part of the defendant, unexpectedly absented himself about the time the cause was called on to trial, his absence not being known, until after the jury was called. The affidavit of the witness accompanies this application, and shows very clearly the materiality of his testimony.—The defendant cannot be charged with such negligence as to preclude himself on that ground. Knowing that the witness had been attending for several days, the defendant had good reason to believe he was still there, and his suddenly absenting himself was matter of surprise. A new trial must be granted on payment of costs."

So, in *Sargent v. Deniston*.<sup>(1)</sup> Case for seduction. The principal witness laid the seduction upon a day which the defendant had no reason to anticipate, and could not be prepared to meet, when in fact he was 30 or 40 miles distant. And upon this ground, among others that the defendant was taken by surprise and could clearly prove an *alibi*, it was moved to set aside the verdict and for a new trial, which was resisted principally on the ground that it went to impeach the witness. The court granted a new trial, and upon the main point say that the defendant was guilty of no laches, upon the supposition that he never had connexion with the witness, and that her whole story is a fabrication. He could not have anticipated that she would allege the connexion to have taken place, at a period subsequent to his leaving the neighbourhood, and consequently was not, in the exercise

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(1) 5 Cowen, 106.

of ordinary diligence and discretion, bound to be prepared to show when he did leave it. Nor is the effect of the testimony merely to impeach the witness. It establishes a fact which shows conclusively that the defendant could not have been the father of the child. It does not contradict her in an incidental circumstance, but it disproves, or has a direct tendency to disprove, the existence of the main fact itself.

So, in *Jackson v. Warford*.(1) Held that a new trial will be granted on the ground of surprise, where the attorney of one of the parties had in his possession a deed, important to the rights of the other party, and, before the trial, delivered it to a third person, without apprising his adversary, who subpoenaed the attorney and also gave notice to him to produce the deed, and on the trial first learnt that it was not in his possession.

So, in *Peterson v. Barry*.(2) Action in assumpsit and verdict for plaintiff, who now moved for a new trial upon an affidavit, stating that the jury had found too little for him by 500 dollars and the interest; and that the plaintiff had been surprised at the trial, by an allegation that the defendant had paid him a check for 500 dollars, on the Farmers' and Mechanics' Bank, which was sworn to by two witnesses, who were perjured. The affidavit proceeded to deny the payment most explicitly. These affidavits were corroborated by the testimony of several witnesses, who were examined on the motion, and *Per Curiam*—“ This is a case of an extraordinary nature, in which the character of both parties is very much concerned. The circumstances proved to-day are material. The defendant paid Wright 600 dollars in six notes for one hundred dollars each, of the Farmers' and Mechanics' Bank. This sum with twenty dollars drawn by the defendant afterwards

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(1) 7 Wendell, 62.

(2) 4 Binn. 481.

from that bank, make 620 dollars, the whole of his credit in the bank. We wish to know from whence these 600 dollars came, and the defendant will have an opportunity of showing this on another trial. On the whole we are of opinion that the case requires further explanation, and therefore that there should be a new trial."

3. But to entitle the party to relief there must be merits, and the surprise must be such as care and prudence could not provide against. The slightest negligence will defeat the application, or occasion the imposition of rigorous terms.

In *Fourdrinier v. Bradbury*.<sup>(1)</sup> It appeared upon the affidavits that the cause had been entered, as a cause ready for trial, for several days, in the lists put up on the outside of the court. On the day of the trial, the special jury causes having been disposed of, this was taken, out of its course, as an undefended cause. The defendant's attorney swore, that thirty causes then stood before it in the paper, and that he always meant to defend the cause, that he had delivered a brief to counsel; and that on the morning in question, he was present at the sitting of the court, and finding several special jury causes appointed, and so many common jury causes, which, in their regular order, must have been tried before this, he went away, and returned again at two o'clock, when he found that this cause had been tried. And *per Abbott*, Ch. J. "The circumstance of the cause being in the list of the day, is sufficient notice that it may be tried in the course of the day, at any time, or in any order, that circumstances might render most convenient.—As it is not sworn at what time the brief was delivered to counsel, and as the defendant was bound to be ready at any time in the day, on which the

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(1) 3 Barn. & Ald. 328.

cause might have been called on, a new trial can only be granted, upon the terms of paying the costs of the former trial."

In *Blackhurst v. Bulmer*.(1) The case stood No. 90, in the printed list at the sittings in term. The defendant's counsel objected to its being tried out of its turn, and declined to appear for the defendant. The written list of causes, affixed in the usual way on the outside of the court, did not extend beyond No. 26 of the printed list. The cause, however, was tried by *Best, J.*, on the ground stated to him, that there was no substantial defence to the action, and that there were witnesses for the plaintiff remaining in town on purpose, whose residence was in Lancashire. No affidavit of merits was now produced in support of the application. *Abbott, Ch. J.* "There is no injustice in the particular case, inasmuch as the defendant does not venture now to swear to merits. Nor is there in the present instance any inconvenience, either to the counsel or the attorney for the defendant, for both were in fact present at the time of the trial; but the counsel, as a matter of policy, did not choose to appear. With respect to the general rule, it may be doubted, whether the modern practice of putting up written lists, has not done more harm than good; but at all events it cannot be permitted, that a defendant in any case shall prevent a judge from trying a cause, in the printed paper, that he may think proper, merely for the purpose of delay, or at least without showing some substantial ground, either of justice or convenience." And rule refused.

So, in *Atterbury v. Fairmanner*.(2) Assumpsit on warranty of a horse. Plea, general issue, and verdict for plaintiff. Motion for new trial, on the ground that the defendant had been taken by surprise, as to the species of

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(1) 1 Dow. & Ryl. 553.

(2) 8 Moore, 32.

unsoundness of the horse set up by the plaintiff, and on affidavit of a veterinary surgeon, that there was no such disease known. But *Per Curiam*. "The plaintiff made out a *prima facie* case, that the horse was not sound, and the defendant should have been prepared to meet or rebut it at the trial. The veterinary surgeon, who has since made the affidavit, might have been then examined, or the horse might have been previously shown to him. At all events, it was peculiarly a question for the jury; and if the defendant had wished to ascertain the nature of the unsoundness, he should have taken out a summons for that purpose."

In *Bell v. Thompson*,<sup>(1)</sup> the attorney-general moved to set aside a verdict given for the plaintiff, and to be let into a new trial on terms. He stated that a witness, on the part of the plaintiff, had proved a fact to the great surprise of the defendant, and that he had omitted to cross-examine him, or observe on his evidence; and on this he grounded his present motion. Lord *Ellenborough*, Ch. J.—"We cannot on that ground grant a new trial. The witness was not impeached at all, and no evidence was called to contradict him, nor were there any questions asked of him."

A similar rule of practise exists in New-York. *Jackson v. Roe*.<sup>(2)</sup> Motion to set aside a nonsuit, and for a new trial, on the ground that at the trial the defendant denied the title set up by the plaintiff, who was not prepared to meet it, and that he was *surprised* by the defence. *Per Curiam*.—"It is a well settled rule, that a new trial will not be granted, because the party came to trial unprepared, and this rule applies with at least as much force to the plaintiff as to the defendant. In *Cooke v. Berry*,<sup>(3)</sup> the

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(1) 2 Chitty's Rep. 194.

(2) 9 Johns. Rep. 77.

(3) 1 Wils. 98.

plaintiff did not come prepared to meet the defendant's plea, because he took it to be a sham plea, as he had a letter under the defendant's hand, acknowledging the debt, but that letter he was not prepared to prove, and the defendant had a verdict; and on motion for a new trial, it was denied. That was a much harder case than this, for there the plaintiff lost his debt for ever; but here he was only nonsuited, and whether he was nonsuited or had a verdict against him, he is equally at liberty to bring a new suit, and is only punished in costs, for his neglect or carelessness. The general rule is too well established to be questioned, and too useful to admit of innovation."<sup>(1)</sup>

In Vermont, it has been ruled that the party must expressly show he has sustained *injury*, and set forth the evidence in detail, which he would have had but for the surprise, otherwise the motion would be denied. As in *Blake v. Howe*,<sup>(2)</sup> in ejectment. Plea not guilty, and verdict for the plaintiff. Motion for a new trial, on the ground of surprise, and upon exceptions taken at the trial. Upon the point of surprise, the court remark—"The court have already suggested that this question is addressed to their sound discretion, for the purpose of doing justice between the parties. Now, the defendant ought not only to show a surprise, but to show that he is injured by it; to show that, upon a new hearing, he can make out such a title as would probably be, not only a legal, but equitable defence to the action. If he would claim any thing on account of title, he should show to the court what that title is. That, when adduced, may appear but another link in the same chain of title under the plaintiff—or it may appear so wholly defective as to amount to no title whatever."

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(1) Et vide 2 Caines, 129, and 8 Cowen, 273.

(2) 1 Aikens, 306.

So, in South Carolina, it has been ruled, a new trial will not be granted where the surprise originates out of the face of a paper, on which alone the right of the plaintiff to recover depended. *Cockrill v. Calhoun*.<sup>(1)</sup> Action in partition. The principal question turned upon the fact, whether the widow of the testator, through whose will the plaintiff claimed, was since married to one M'Connell. The weight of evidence was with the defendant, and the jury found accordingly. The plaintiff moved to set aside the verdict, on the ground of surprise, as to the defendant's testimony to that point. But, *by the Court*.—"There may be cases where the court would grant new trials on the ground of surprise alone; but it must arise out of facts, which are in their nature calculated to produce that effect, and against which a party could not be reasonably expected to be prepared. But that can never be the case where it arises out of the face of a paper, on which alone the right of the party to recover depends. To grant a new trial on such grounds, would be to do so at the will of the party, until they were weary of litigation. The motion must therefore be dismissed."

But notwithstanding the disinclination of the courts to relieve against surprise occasioned by negligence, yet where justice demands, it will be done; and, if the negligence be really attributable to the attorney, he will be directed to pay the costs. Thus,

In *Martyn v. Podger*.<sup>(2)</sup> Trespass for carrying away goods. Plea not guilty. The plaintiff claimed the goods by a bill of sale from his son. The defendants justified as bailiffs, on a writ of *feri facias*, on a judgment against the son William Martyn, by one Pullin. Owing to inadvertence, the defendants had not the judgment to produce at the trial, and there was therefore a verdict for the plaintiff.

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(1) 1 Nott & M'Cord, 285.

(2) 5 Burr. 2631.

But for this there had been a verdict for the defendants, it being a case of gross fraud. Upon a motion for a new trial, Lord *Mansfield* observed: "The bailiffs are only nominal; the plaintiff in the original action, Hugh Pullin, is to be considered as the creditor of William Martyn, the son of the present plaintiff. The copy of the judgment ought to have been produced. But the verdict arises from a slip and inadvertence; it is against law and justice. The plaintiff has no merits. The bill of sale was fraudulent; the son remained in possession. The recovery is manifestly contrary to reason and justice." Therefore his lordship and the court were unanimous, that there should be a new trial.(1)

As illustrative of the other branch of the rule, *De Rouffigny v. Peale*,(2) on a motion for a new trial, may suffice.

This cause had stood first in the cause paper for trial at a sittings in term. When the cause was called on, the defendant's attorney had delivered no brief to his counsel, although he had had a consultation with him the preceding night; and the cause being thus undefended, a verdict passed for the plaintiff. Soon after the verdict had been recorded, the defendant's attorney came into court with the brief, to instruct his counsel to defend his cause. The Court held that it would be only encouraging the negligence of attorneys, to grant such an indulgence in the ordinary way, at the client's expense; attorneys ought to know that they are amenable to their clients for the consequences of such neglect; neither would it be putting the plaintiff in the same situation, if they were to grant the rule on the payment of costs between party and party; they therefore granted a rule *nisi*, which, on a subsequent day, was made absolute for a new trial, upon payment by

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(1) Et vide 4 Monroe, 4, and 5 Ibid. 440. (2) 3 Taunt. 484.



the defendant's attorney, out of his own pocket, of all costs, as between attorney and client.

4. When, in the progress of the trial, the cause suffers injustice, from the honest mistake of the party or his counsel, relief will be extended by granting a new trial.

Thus, where the counsel were misled by an intimation of the court, as in *Le Fleming v. Simpson*,<sup>(1)</sup> already cited. The judge intimated a strong opinion, and the counsel having therefore omitted to call evidence, the court, for that reason, directed a new trial.

So, in *Durham v. Baxter*.<sup>(2)</sup> Action in *assumpsit*. The plaintiff had submitted his proof, and the defendant's counsel was proceeding to examine witnesses, but was stopped by the court, who stated to the jury that the evidence exhibited by the plaintiffs was insufficient for them to recover upon; that all which appeared was, that the plaintiffs had purchased the bill, trusting to the signature of the drawer and endorser; that, as they had not required the endorsement of Baxter, he was not liable, if it should be returned, unless he had, at the time of its transfer to the plaintiffs, by an affirmation that it was a good bill, induced them to take it. The jury nevertheless returned a verdict for the plaintiffs for 600 dollars. A motion was made by the defendant's counsel for a new trial,—and upon the foregoing report being read, the court said they were all satisfied, without considering the legality of the judge's direction, that the cause must again be sent to another jury. The defendant, without any fault on his part, had not been heard, and although a review was open in this case, they did not require him to waive it, as in fact he had had no trial.

But it would appear the intimation of the court must be

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(1) 1 Man. & Ryl. 269.

(2) 4 Mass. Rep. 79.

something more than *a mere suggestion*. If the judge manifestly intends that the counsel should, notwithstanding the intimation, exercise his own discretion, and take the risk, and he elects to acquiesce in it, a new trial will not be granted.

In *Beekman v. Bemus*.<sup>(1)</sup> After the plaintiff rested his cause at the circuit, on the trial of a question of fact, the defendant's counsel called a witness on his part, who was sworn ; but the judge intimated an opinion in favour of the defendant on the question, and the counsel forebore to examine the witness, or introduce any further testimony, and this though the defendant urged him to go on with his proof. The jury found for the plaintiff. The defendant moved for a new trial, among other causes, for this, that he had not a full and fair trial, owing to its interruption by an intimation from the judge. Upon this point the *Court* say, "After the plaintiff rested his cause, the defendant called a witness who was sworn ; but before he gave any evidence, the judge intimated to the counsel for the defendant, that it was hardly necessary in the then state of the cause, for the defendant to give any evidence ; and no evidence was offered on the part of the defendant. The judge did not exclude any testimony. He gave the counsel to understand that his impressions were favourable to the defendant, not that the cause was directly in their favour. They offered no farther evidence, reposing on that already given ; and, undoubtedly, satisfied that, with the intimation from the court, they might safely submit their cause. They did submit the cause under these circumstances, and thereby assented to incur the risk, if any, of not adducing further evidence."

So, in *Jackson v. Cody*,<sup>(2)</sup> in ejectment. After the testimony on both sides had closed, and when the counsel for

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(1) 7 Cowen, 29.

(2) 9 Cowen, 140.

the defendant rose to address the jury, his honour the judge remarked, that he considered the case as depending on questions of law and not of fact, and that he should so charge the jury ; and that he should also charge them that, upon the whole matter, the plaintiff was entitled to recover five-ninths of the premises in question ; upon which the defendant's counsel omitted to sum up the cause, and his honour directed the jury to find a verdict for the plaintiff, which they accordingly did. On motion for a new trial, this ground, among others, was taken, that the counsel were not permitted by the judge to address the jury. Upon which the court observe : " The counsel were not precluded from going to the jury. The case states that the counsel for the defendant rose to address the jury, when the judge stated his views of the case, and remarked, in conclusion, that he should charge the jury that the plaintiff was entitled to recover five-ninths of the premises in question ; upon which the defendant's counsel omitted to sum up the cause. This was a voluntary, not a compulsory, relinquishment of his right to address the jury. The motion for a new trial must be denied."

And should the mistake arise from any other cause, and be such as may happen to parties or their counsel exercising ordinary care and prudence, the court will relieve them, by setting aside the verdict, where injustice would otherwise be done.

In *Smith v. Cuff*.(1) New trial granted on payment of costs, where plaintiff was nonsuited on the ground that there was no special memorandum, and the writ was not in court to prove the commencement of the action, and the cause of action accrued after first day of term.

In *D'Aguilar v. Tobin*.(2) Various actions on policies of insurance and verdicts for the plaintiff. A rule to

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(1) 2 Chitty's Rep. 271.

(2) 2 Marshall, 265.

How cause why the verdicts should not be set aside was obtained, on an affidavit, which stated, that the clerk of the admiralty had omitted by mistake to bring with him the necessary documents, and also stating a letter, from the secretary to the admiralty, informing the defendant that those documents should be produced on a second trial of the cause. Lord Chief Justice *Gibbs*—"We will confine the defendant to the point which he has raised; but in such a case as this we cannot refuse to permit his going into this defence. The money should however be brought into court, because this is a defence which does not go to the merits. But only in the present action; for though there are circumstances under which we should direct the money to be paid into court in all the actions, yet where a defendant has been deprived, by mistake, of a part of the evidence, I think that is a condition which should not be imposed."

And in *Weak v. Callaway*,<sup>(1)</sup> in ejectment. On the trial, the lessors of the plaintiff failed in proving their case; because when they had shown that he was married to a woman of the name of Joanna Forrest, the defendants proved that Joanna Forrest had been married to another person. They afterwards discovered, by the register, which they had not been able to find before the trial, that the grandfather had been married to Ann Forrest, and upon that they moved for, and obtained a rule, to show cause why there should not be a new trial, on an affidavit stating the above facts. The court saying that this was a case in which the making absolute the rule which had been granted for a new trial, could not operate to the injury of the defendants, and might assist the justice of the case, under the circumstances, made the rule absolute.

In a case in *Vermont*, *Starkweather v. Loomis*.<sup>(2)</sup>

(1) 7 Price, 677.

(2) 2 Vermont Rep. 573.

A new trial was granted as for surprise, where evidence was excluded, which was offered in reliance upon a reported case. The action was debt on a justice's judgment of a neighbouring state, and the defendant pleaded *nil debet*, relying upon the case of *King v. Van Gilder*,<sup>(1)</sup> that it was to be treated as a foreign judgment. On the trial, however, it was held otherwise; and he was prevented from going into evidence of the merits of the original judgment, which he had had no opportunity of inquiring into in the other state. The court held that he was surprised by the case reported, and no laches being imputable to him, granted a new trial on payment of costs.

So, in *Daniel v. Rose*.<sup>(2)</sup> Where on the argument of a case, in the constitutional court of South Carolina, it was discovered that a conveyance was made by A. and his daughter B., who in the argument below, had been considered as the wife of A., a new trial was granted. The court, putting their decision on this ground, observe, "the object of granting new trials is, that justice may be done between the parties; and when the court clearly sees, that a case has not been fairly tried upon the merits, and that without fault of the party, justice and reason require that a new trial should be granted. Now the discovery made for the first time on the argument of this case—that Rosanna is called the daughter in the deed to Alexander Rose, and not the wife of Henry Brown—raises the strongest presumption that there was some mistake in the parol evidence adduced on the trial below. And it is extraordinary, (but most certainly true,) that this fact had escaped the observation of the court, and the counsel on both sides, on two trials in the circuit court, and a previous argument in this court; for until now she has been uniformly re-

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(1) Chipman, 59.

(2) 1 Nott & M'Cord, 33.

arded as the wife, and not the daughter of Henry Brown, which, in my mind is a fact of the first importance in the case."

So, in *North Carolina*, in *Palmer v. Popelston*,<sup>(1)</sup> where an objection was taken on the trial to a bill of sale, because registered in the wrong county, and on a former trial between the same parties, the bill of sale had been read without objection, the court set aside a nonsuit founded on the objection, upon payment of costs, on the ground of surprise, and to promote the justice of the case.

Upon the same principle also, in *Kentucky*, in *Boyce v. Yoder*,<sup>(2)</sup> a new trial was granted on the ground of surprise, produced by the rejection of a deed which the party believed, and had a reasonable ground to believe, from the circumstances, was admissible.

So, where counsel suffered a verdict to pass against his client, without a trial, clearly by mistake, and to his prejudice, the supreme court of New Hampshire, in *Riley v. Emerson*,<sup>(3)</sup> granted a new trial. And in *Winn v. Young*,<sup>(4)</sup> in *Kentucky*, the same principle has been adopted. And it has been held that where a verdict is not the result of a compromise of doubtful rights, but of the error of the court, or the mistake of the counsel transcending his powers, a new trial will be granted.

But the court will not allow motions grounded on mistake to prevail against the justice of the case, nor unless the mistake be wholly free from blame. This rule presents the true grounds, blameless mistake, and injury to the party; and if the latter in seeking relief do not satisfy the court in both respects, the motion will be denied.

A motion for a new trial on the ground of mistake was therefore refused in *Wits v. Polehampton*,<sup>(5)</sup> being con-

(1) 1 Hawks, 307.

(2) 2 J. J. Marsh. 515.

(3) 5 New-Hampshire Rep. 531.

(4) 1 J. J. Marsh. 52.

(5) 2 Salk. 647.

trary to justice. It was moved for a new trial, because the defendant having pleaded a composition, had forgot to carry down witnesses to prove the subscribers' hands; and the motion was denied because the debt was honest. And *Holt*, Ch. J., remembered where debt on a bond was brought against an heir, who pleaded *riens per descent*, but the verdict went against him by omitting to bring the settlement to the trial; and the court being moved, refused to grant a new trial, because it was an honest debt.

So, where a defendant by the mistake of his attorney, pleads a plea which does not cover his defence, and on trial a verdict is therefore against him, the supreme court will not for that reason grant a new trial. *McNeish v. Stewart*.<sup>(1)</sup> It was an action on covenant of seisin. Plea *non est factum*, and verdict for plaintiff. Motion to set the verdict aside on an affidavit, stating that the plea was put in under a mistaken supposition by the attorney for the defendant, that the plaintiff must prove a breach, and the defendant might show, in his defence, any matter which would go to defeat or diminish the amount of the plaintiff's recovery, and that the plaintiff did not pretend a failure of title as to all the land conveyed. But, *Per Curiam*—“We cannot receive this excuse as a ground for the relief sought. Though it appears to be founded in good faith, yet a contrary practice would lead to endless excuses founded in mere pretence. After the defendant has gone to trial upon pleadings which do not cover his defence, and has a verdict against him, it is too late for him to move for an amendment. He must go down to trial prepared.”<sup>(2)</sup>

So, in *Gorgerat v. McCarty*,<sup>(3)</sup> held that the mistake of the party or his counsel, is no ground for a new trial. What the court meant by mistake, is explained in their

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(1) 7 Cowen, 474.

(2) Et vide 7 Cowen, 369.

(3) 1 Yates, 253.

opinion, and is reconcilable with the cases cited in support of the preceding rule. "The plaintiff was nonsuited for want of testimony, the ordinary case, not so much of mistake, as the absolute want of evidence." And upon this they say, "We know of no case in the books, where a nonsuit, entered for want of testimony on the part of the plaintiff at the trial, has been taken off; nor do we apprehend the mistake of the party or his counsel to be a ground for a new trial."

5. But the court will not relieve the party from the consequences of mere ignorance, inadvertence or neglect, by granting a new trial.

Thus, if the party or his counsel omit to put forward a claim at the trial. So ruled in *M<sup>r</sup> Dermott v. The United States Insurance Company*.<sup>(1)</sup> Action upon a policy, and verdict for the defendants, with points reserved, one of which was, as to whether an award which had been made between the parties was final. The parties had offered evidence on the present claim, and the arbitrators had indorsed upon their submission, that "having examined all the evidence offered by the parties, they are of opinion that proof has not been produced sufficient to establish a claim against the United States Insurance Company, for loss on the policies, Nos. 2268 and 2269, dated 6th December, 1809, per schooner *Emily*, Captain *De Weeve*." Held, that an award in a suit on a policy of insurance, that proof had not been produced sufficient to establish a claim against the defendant, is as much as saying that the plaintiff had no cause of action, and is final and conclusive, and the court will not grant a new trial on the ground of a claim which the party might have brought forward at the trial, and did not.<sup>(2)</sup>

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(1) 3 Serg. & Rawl. 604.

(2) Et vide 6 Monroe, 147.



So, if the party neglect to apply in time to a court of law for a new trial, it will be refused in equity. In *Bateman v. Willoe*.<sup>(1)</sup> The defendant had a verdict. Bateman conceiving that he had good grounds to impeach this verdict, directed a motion to be made, and filed an affidavit for the purpose, but by some mistake, notice of the motion was not given until after the period, within which, by the rules of the court of exchequer, it was competent to him to give it, and the court therefore, on that ground, and without going into the merits of the application, refused to disturb the verdict. Thereupon the present bill was filed, stating that there were unreasonable charges in the plaintiff's bills. The bill prayed an account and injunction. The chancellor, *Redesdale*, dismissed the bill, remarking, among other things : " Whether Willoe had a right to the charges or not, was a matter capable of being laid before a jury, and if Bateman had shown that he ought to have credit for these sums, credit must have been given him, if he took the proper means for that purpose. Then an application is made to the exchequer for a new trial, which I understand to have been grounded on the same matters that are made the ground of the present suit, but the notice was too late, and the court refused a new trial. That court has established a rule necessary for the purposes of justice, and being so, it would be contrary to those purposes if I should break through it. I should render that rule nugatory and defeat justice, if in every case where the party has neglected to apply in due time to the court of law, he should be at liberty to come into equity for a new trial."

In cases of surprise, the situation of the plaintiff differs from that of the defendant. When he is surprised by the production of unexpected evidence at the trial, he may submit to a nonsuit, and if he neglects it, he will not be relieved, unless he

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(1) 1 Sch. & Lef. 201.

was prevented from being nonsuited by fraud or accident. Thus in an issue out of chancery, upon a motion for a new trial, because the defendant had produced evidence, by surprise, which the plaintiff, if prepared, could have answered, one main reason for denying the motion was, that the plaintiff suffered a verdict to be given when he might have been nonsuited.(1)

In *Harrison v. Harrison*,(2) which was an action for the balance of an account for work done, the jury believing the defendant's witnesses, who proved an acknowledgment on the part of the plaintiff, that he had been paid, found for the defendant. *Peake*, sergeant, obtained a rule to show cause why there should not be a new trial on the ground of surprise, on affidavits stating that the witnesses on the part of the defendant at the trial, who swore that the plaintiff had acknowledged having received money from the defendant, had since been heard to say, that they had been in effect suborned by the defendant, and had sworn what was not true. It was also sworn that the defendant had applied to several persons, endeavouring to induce them to state at the trial, that they had been present at conversations wherein the same acknowledgments had been made. There were other affidavits in which it was stated that the defendant's witnesses had, after the trial, acknowledged that they had been suborned, and had perjured themselves; detailing minutely various conversations wherein they had done so. Affidavits were submitted on the part of the defendant, denying these facts. *Wood*, Baron.—“It would be a very bad precedent, if we were to make this rule absolute. The consequence would be, that we should have a vast number of new trials applied for, charging the witnesses of the succeeding party with perjury. There are besides other rea-

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(1) *Richards v. Syme*, Buller's N. P. 326. (2) 9 Price, 89.

sons in this case for discharging the rule.—The ground of the application was surprise. I have no doubt that the plaintiff was surprised when the defendant proved his acknowledgment, of having received money from him for which he had not thought proper to account, and was proceeding to recover by this action. If that had not been true, he *should have requested to be nonsuited*, that he might have become better prepared in another action; but he chose, notwithstanding, to go on and take the chance of a verdict, by letting the case go to the jury, in the hope, perhaps, that they would disbelieve the defendant's witnesses. Now suppose we should grant a new trial, the plaintiff might again take the chance of being believed, and if not, he might apply to the court again on the same grounds. It would become a common course on all occasions of failure, if this were to be tolerated, for a plaintiff instead of choosing to be nonsuited, as he ought to have done in this case, for that is the only proper course—to try first what the jury will do for him, and if he should fail, he will then apply to the court out of which the record issues for a new trial. It is impossible to grant or listen to such an application.”(1)

So, in *Oswald v. Tyler*.(2) Appeal from the decree of the court of chancery denying a new trial. The grounds of the application are contained in the opinion of the court, who affirmed the decision, two out of three. *By the President*.—“Upon the facts in the case, it does not appear that any fraud was practised by the defendants by which this negligence on the part of the plaintiffs was produced, nor does it appear that there was any obstacle imputable to the defendants, to prevent their counsel, after the testimony was disclosed *from suffering a nonsuit*. He freely submitted the case to the jury, and took the chance

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(1) Et vide 6 Moore & Payne, 229.

(2) 4 Randolph, 19.

of a verdict in his favour. The application then for relief is solely on the ground that great injustice has been done them in the trial at law. It seems to me very clear, that if a party neglects to avail himself of his remedies for injustice done, a court of equity ought not to interfere. This doctrine is the more reasonable in its application to plaintiffs at law than to defendants. The former always have it in their power, in a case like the present, to be relieved against surprise on the trial if any, by suffering a nonsuit. They are not compelled, as defendants are, to submit their case to the jury."

And in *Willard v. Wetherbee*.<sup>(1)</sup> Held, that when a party is surprised at a trial by the evidence upon a particular point, it is a good cause for motion to delay the trial, but where no such motion is made, it is not a good ground for a subsequent motion for a new trial.

A still stronger reason exists in this country for refusing a new trial to a plaintiff, upon the ground of surprise or mistake, where the practice has been introduced, of allowing a juror to be withdrawn and retaining the cause upon the calendar, instead of nonsuiting a plaintiff for a defect in his proof.<sup>(2)</sup> This rule has been held to apply also to criminal cases.<sup>(3)</sup> And although in England the plaintiff cannot be permitted to withdraw the record,<sup>(4)</sup> yet he has a right, upon his cause being called on, to request the swearing of the jury to be suspended until his witnesses have been called; and if they be absent, the counsel may withdraw the record, and thus avoid a nonsuit, which, if the jury had been first sworn, he must have submitted to.<sup>(5)</sup>

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<sup>(1)</sup> 1 New-Hampshire Cases, 118.

<sup>(2)</sup> Gra. Prac. 252. Et vide *The People v. The New-York Common Pleas*, 8 Cowen, 127.

<sup>(3)</sup> *United States v. Coolidge*, 2 Gallison, 364.

<sup>(4)</sup> 1 Chit. Arch. 273.

<sup>(5)</sup> *Hopper v. Smith*, 1 Moody & Malkin, 115.

The same rule applies, where counsel, from motives of prudence, omit evidence which, upon reflection they think if introduced, would have benefitted their cause.

As in *Spong v. Hog*.<sup>(1)</sup> The plaintiff had sued the defendant in trespass and in slander. The latter case was first called and tried, and the counsel declined giving any evidence that might look like a justification, and so swell the damages. The jury found a verdict of £100 damages. The trespass came on, and upon a full disclosure of the circumstances, there was a verdict for the defendant. The defendant then moved for a new trial in the slander suit, on the ground of evidence he had thought proper to suppress, and of excessive damages. But, *Per De Grey, Ch. J.*—"The only grounds upon which this rule can be supported are, either first, because the defendant might have given evidence in mitigation of damages, which then it appeared prudent to omit. This was never a ground for a new trial. Hardly a case happens where evidence of some kind or other, is not, in discretion, kept back. And it would be of fatal consequence to give the parties an opportunity of introducing new evidence when they see where the cause presses."

So, if the leading counsel at *nisi prius*, take one line of case contrary to the opinion of his junior counsel, the court will not permit the junior counsel to obtain a new trial upon the ground, that he was prepared with evidence to support another line of case, which his leader repudiated. Thus held in *Pickering v. Dowson*.<sup>(2)</sup> Action for deceit in the sale of a ship. The judge was of opinion upon the evidence, that the defendants were not liable in law, and directed a nonsuit. Motion for a rule *nisi*, to set aside the nonsuit, and for a new trial. The counsel on the argument took a different line of case from that adopted at the

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(1) 2 W. Black. 802.

(2) 4 Taunt. 779.

trial, on which *Gibbs*, J. observed : —“ My brother *Best*, who led the cause, used his discretion at the trial and did not go on this line of case. If the counsel who leads the cause takes one line, and the judge and jury decide on the line taken by the leader, the junior counsel also must confine himself to the line taken by the leader. This matter was stated, and I repeatedly called for evidence of this sort, and under the direction of the leader none such was produced.”

For a client is bound by the conduct of his advocate. *Hall v. Stothard*.(1) Verdict for defendant, and motion to set it aside, and for a new trial. The action was brought for refusing to receive some linseed, which the plaintiff had contracted to deliver within fourteen days, the price being payable at the time of delivery. A portion of the linseed had been delivered, and the question was, whether the defendant was obliged to receive the remainder, an alteration having taken place in the price of the article. The action was resisted on the ground, that the defendant had applied for the delivery of the remainder of the linseed, and that the answer was, that plaintiff had not got it all to deliver. It was now observed in support of the motion for a new trial, that the plaintiff's clerks, to whom this application had been made, were in court, and the plaintiff's attorney wished them to be called, but that the counsel declined to pursue that course, and that ultimately the verdict passed for the defendant. Lord *Ellenborough*, Ch. J.—“ The client must be bound by the conduct of his counsel, otherwise there would be no end to applications to the court for new trials. Where the parties wish one course to be adopted, and the counsel take another, the parties must, nevertheless, abide by the acts of their counsel, however contrary to their wishes ;” and rule refused.(2)

(1) 2 Chitty's Rep. 267.

(2) Et vide, 20 Mart. Louis. Rep. 187.

So, in *Grill v. Crawley*.<sup>(1)</sup> The defendant's attorney knew a week before the cause was called on that it was set down for trial, but had neither delivered a brief nor examined his witnesses. When the cause was called on, no one appeared for the defendant, and a verdict was taken for the plaintiff. The court refused a new trial on any ground, though it was sworn that the defendant was taken by surprise, and had a good defence.<sup>(2)</sup>

And where an executor, being sued on a bond of his testator, of more than twenty years' standing, was advised by his counsel to rely on the presumption of payment arising from the length of time, and supposing such presumption a sufficient defence, neglected to fortify it by other testimony, which was in his power, in consequence of evidence given by one of the jurors in the jury-room, a verdict was found against him. He moved for a new trial on that ground, but was refused.<sup>(3)</sup>

The rule applies with equal force if the counsel acquiesce in the decisions of the court. He will not be permitted to urge objections upon an after thought, to disturb the verdict. In *Robinson v. Cook*,<sup>(4)</sup> in replevin on a distress for rent and tender before suit brought; but objected to, because the precise sum was not tendered, and the tender was coupled with a qualification deducting the property tax, and so fatal. The plaintiff's counsel took no other distinction, and the judge held both objections valid, and directed a verdict for the defendant, in which the plaintiff's counsel acquiesced. Motion to set aside the verdict, upon the ground that the tender of a greater sum was a good tender, taking up the objections made at the trial, but abandoned. The court inclined to think both objections good.

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(1) 8 Bingham, 144.

(2) Et vide, 10 Mod. 202.

(3) *Price v. Fuqua*, 4 Munf. 68.

(4) 6 Taunt. 336.

but peremptorily refused, after the points had been abandoned by the plaintiff's counsel at the trial, and the defendant thereby precluded from going into his case, to permit them to be now even mooted.(1)

So, in *Lewis v. Stevenson*.(2) A verdict was taken, subject to the opinion of the court. The judgment of the court was founded principally upon the fact, that the defendant had not, in receiving the goods of the mortgagor, acted with a sufficient degree of caution, and had not made due inquiry as to the right of the party in possession, to pledge property which had been previously conveyed to the plaintiff. The defendant moved for a new trial upon the ground of surprise, on an affidavit, setting forth that at the trial, neither himself nor his counsel supposed that any question of fact, as to his vigilance, in receiving the property, would be raised, and that he could have produced testimony upon that point which would have satisfied the jury, if he had supposed that such a question was to arise in any stage of the cause. That after the evidence had been closed, it was assumed by the judge, who tried the cause, and by the counsel for both parties, that the result would depend entirely on questions of law ; and that therefore, the defendant's counsel were willing that a verdict should be taken for the plaintiffs, subject to the opinion of the court, upon a case to be made, not supposing that the judgment of the court would rest upon a question of fact. The affidavit then stated, that the defendant was taken entirely by surprise, and that upon a new trial, he could make the question of caution clear in his favour. *Per Curiam*—"The defendant has no cause of complaint. He might have submitted all questions of fact to the jury at the trial, if he had been disposed to do so, and there was no attempt to influence him to the contrary. By putting the

(1) *Et vide*, 7 Greenl. 204.

(2) 2 Hall's Rep. 248.



whole question to the court, he took no higher risk than the plaintiffs did, and can have no greater rights. If the opinion of the court had been adverse to the plaintiffs, upon the question of fraud, whether in fact or in law, or upon any of the other questions presented by the case, their judgment would have been final. The plaintiffs could not have moved again in the matter, but would have been concluded by their own acts. The defendant's rights in these particulars are the same with the plaintiffs', and he has concluded himself, by voluntarily putting all questions of fact, as well as law, to the court."

Much less will the court grant a new trial to admit evidence which might have been produced by exercising ordinary diligence at the trial.(1)

In *Cooke v. Berry*.(2) Assumpsit upon a promissory note. Defendant pleaded that the plaintiff accepted of some chests of tea in satisfaction, upon which issue was joined, and there was a verdict for the defendant; it was now moved on behalf of the plaintiff for a new trial, upon an affidavit that the plaintiff took this to be a sham plea, and that he had a letter under the defendant's own hand, wherein it appears the defendant had disposed of the tea to another person, and wherein the defendant says he will pay the plaintiff his money due upon the note, which letter the plaintiff did not produce at the trial, thinking the plea was a sham, and the defendant could not possibly prove it. But *Per Curiam*—"New trials are never granted upon the motion of a party where it appears he might have produced and given material evidence at the trial if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes if once a door was opened to this. Suppose in a *scire facias* upon a judgment, the defendant has a release, he is summoned,

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(1) Vide 5 Wendell, 127.

(2) 1 Wils. 98.

and has an opportunity of pleading it and does not, he shall never have an *audita querela* : this is a very strong case at bar, for the plaintiff has notice of the defence of the defendant in his plea, and ought to have come prepared to falsify it at the trial." And *Dennison*, J., said he remembered a case of a horse plea, where the defendant pleaded he gave the plaintiff a horse in satisfaction ; plaintiff looked upon it as a horse (or sham) plea indeed, but the defendant at the trial proved it to be a true plea.

So, in *Price v. Brown*.(1) Upon payment after the day, and before bringing the action, it was pleaded to be a payment of the principal and all interest then due. On evidence, it appeared a gross sum was paid, which upon computation did not amount to the full interest, but it was sworn that the plaintiff accepted it in full. It was objected that they ought to prove it as they had pleaded ; but the chief justice thought it well enough, upon which there was a verdict ; and the next term it was moved on affidavits of the falsity of the defence, and that no defence was expected, and therefore that the plaintiff was unprepared to contradict the single witness who swore to the payment of the money. But the court would grant no new trial, saying it would be of dangerous consequence, to suffer people to be setting up new evidence, after they knew what was sworn before.

So, in *Gist v. Mason*.(2) It was contended at the trial, that certain policies were on an illegal trade ; but the judge being of opinion that they were not so on the face of them, directed a verdict in support of them ; and a motion for a new trial to let the defendants into evidence, to prove the trading so notoriously illegal that the plaintiff must have known it, (which was not offered, on a presumption that the jury must have drawn that conclusion) was refused ; as the defendant made the application to supply his own

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(1) 1 Str. 691.

(2) 1 Term Rep. 84.

negligence, when it was evident that he was not taken by surprise at the trial. 1

So in an *Anonymous* case. 2 A similar application on behalf of a party who had made a mistake on the trial, in a point of evidence which would have encountered the evidence given against him, which mistake was discovered since the trial was closed.

So in *Edwards v. Warner's Adm'r*. 3 where a party knowing a witness to be absent voluntarily risked a trial, it was held that no new trial should be granted, on account of alleged surprise arising from the absence of such witness, no matter how important the facts might have been, which the witness would have proved.

And in *Smith v. Morrison*. 4 where it was alleged that the party was surprised by the production of accounts amounting to an alleged settlement which he would have met by declarations and vouchers in his possession, but which he could not prove at the trial, a new trial was refused, on the ground that by the declaration in the case the party was apprized to be prepared to meet the previous accounts, inasmuch as the plaintiff was not prevented by it from going into the original accounts and that therefore in this respect he had been put on notice, which apprized him of the right to a new trial.

So also in *Edwards v. Jones*. 5 it was held that the attorney of the party taking the trial, misrepresented and suffering a verdict against his client, in his absence, furnished no ground for a new trial. 6

So in *North Carolina v. M'Alister v. Barry*, (7) where a plaintiff supposing himself ready pressed for trial,

1. 10 Exch. 1 Term Rep. 111. 25. 2. *Postscript* 40.

3. 12 J. Marsh. 591.

4. 5 Marsh. Term. Rep. 57.

5. 12 J. Marsh. 471.

6. 10 Exch. 12 J. Marsh. 88.

7. 2 Bayw. 231.

and it was found on the trial that the testimony he relied on could not be given in evidence as he expected, and he was nonsuited, a new trial on the ground of surprise was refused.

And in *Thompson v. Thompson*.(1) The plaintiff's counsel moved to set aside a nonsuit which was suffered, because on the trial, the plaintiff offered an attested copy of a bill of sale for a negro, instead of the original, and did not account for the absence of the original. The plaintiff's counsel said that the papers were shown to them on the day before the trial, and it did not occur to them that the original would be required; nor did they remember that it would be wanting, till the trial came on, and that therefore the plaintiff was surprised, in consequence of their overlooking the objection that was made against them. But, *Per Curiam*.—"This is not surprise, but it is *sua negligentia*, and the nonsuit ought not to be set aside."

So also in *Arrington's Admr. v. Coleman*.(2) When the trial came on, the plaintiff was about to read two depositions of one Philips and his wife, which were essential in the cause, and it was objected that Philips, the witness, was a surety for the costs of the suit, whereupon his testimony was rejected. The plaintiff moved for a new trial, on the ground of surprise, and *M'Cay, J.*, rejected his motion without hesitation.

6. If evidence be not objected to when offered, it will be considered as waived, and cannot sustain a motion for a new trial, under the pretext of surprise or mistake.

So held in *Abbott v. Parsons*.(3) Assumpsit for work and labour. Defendant pleaded an offset. "Cash to Mann, for flour, £18 6s." At the trial before *Gaselee, J.*, the evidence in support of this item was, that flour to that

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(1) 2 Hayw. 405.

(2) Ibid. 300.

(3) 7 Bingham, 563.

amount had been furnished by Mann to the plaintiff; that Mann, many months before the action, sent his bill in to the plaintiff, when the plaintiff's wife complained to Mann, and told him to look to the defendant; since which time no demand had been made on the plaintiff. When the judge was summing up, and not before, the counsel for the defendant objected that this evidence did not support the particular of set-off. The learned judge, however, left it to the jury to say whether Mann had been paid, and a verdict was found for the defendant. On motion for a new trial, on the ground, among others, that the evidence did not support the above item of offset, *Per Tindal*, Ch. J.—“It has been objected, on the part of the plaintiff, that the defendant's claim, in respect of the payment to Mann, has not been so described in the particular of set-off as to entitle the defendant to take advantage of it under the evidence which he has given. But it is of the first importance to the administration of justice, that objections of this kind should be made when the evidence is offered, and that the party should not lie by to speculate on the accidents of the cause. Here the objection was not taken till the judge began to sum up to the jury, and the plaintiff's counsel began to feel the effect of his observations. It is clear from the evidence, that Mann can make no demand on the plaintiff, and the cause ought not to go down again.” *Park*, J.—“The objection ought to have been made when the witness was called to prove the set-off, because then the evidence might have been admitted or rejected, as the case required.”(1)

The same rule was adopted in this state in *Sherman v. Crosby*.(2) Assumpsit on a promissory note. The defendant pleaded non assumpsit, with notice of set-off. In support of the set-off the defendants proved, the plaintiff

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(1) Et vide, 2 Taunt. 217, *in notis*. 5 Pick. 217. 5 Monroe, 177.

(2) 11 Johns. Rep. 70

had authorized Crosby, one of the defendants, to settle a suit he had against one Bennet, and that he, the plaintiff, would account to Crosby, and produced in evidence a receipt of Bennet, to which the plaintiff's counsel objected, insisting that Bennet ought to have been produced. The plaintiff submitted to a nonsuit; and on motion to set it aside, among other grounds, took as a new point, that the defendants could not avail themselves of the payment by one as an offset against a joint debt. The court having overruled the objection taken at the trial proceed to say: "There was no other point raised at the trial or arising on the case, for it is too late for the plaintiff now to object to the offset, on the ground that it was setting off the *separate* debt of one of the defendants, against the *joint* debt of both the defendants. That objection might have been good if made at the trial." The motion was denied.

In *Jackson v. Jackson*,<sup>(1)</sup> illegal evidence had been admitted without objection at the trial. But upon the argument, on motion for a new trial, the objection was taken and overruled. *Per Sutherland, J.*, who delivered the opinion of the court:—"It was made a point in behalf of the defendant, upon the argument, that the evidence, to show that the widow of Jackson claimed to hold the premises, while she continued in possession, in right of her dower, and also the evidence in relation to the death of Jackson, were improperly admitted. The evidence was not objected to upon the trial, and the propriety of its admission cannot now be questioned."

And in *Jackson v. Cody*,<sup>(2)</sup> it was held that the court would intend what was not objected was received by consent. The plaintiff, among other things, produced a deed covering the lot, purporting to have been executed by *William Patterson*, describing him, however, in the fore part of the deed as *William Patterson*, late a soldier in

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(1) 5 Cowen, 173.

(2) 9 Cowen, 140.

the revolutionary war, in *Hazen's* regiment, to *John Blanchard*, of the city of New-York, gentleman, bearing date the 6th day of December, 1790; on the back of which was endorsed, "Registered 30th April, 1795," and an entry of the registry was read in evidence from the book of registry of filed deeds, kept in the office of the clerk of *Cayuga*; which book was produced by the witness, *Gridley*, who testified that it was the book remaining in his office of such entries. It was received without objection. There was a verdict for the plaintiff, and on motion for a new trial, among other causes, it was objected, the deed from *Patterson* to *Blanchard* was not proved. After commenting on the proof as applicable to this point, *Sutherland, J.*, concludes with this remark: "But whether competent or not, as it was not objected to, it must be considered as received by consent."<sup>(1)</sup>

So, in *Massachusetts. Wait v. Maxwell*,<sup>(2)</sup> in action on covenant of seisin. Defendant pleaded his intestate was seized and had good right to convey; and issue thereon. The defendant, to prove seisin, offered a deed to the intestate from Dorothy Kemp. The plaintiff offered certain proceedings in the probate court to prove the deed void, and introduced testimony to show that Dorothy was *non compos* at the time of executing the deed. A verdict was taken for the plaintiff, subject to the opinion of the court, and if against the plaintiff, a new trial to be granted. The principle presented was, the inadmissibility of the proceedings of the court of probates as evidence. Upon this *Parker, Ch. J.*, who delivered the opinion of the court, observes: "Probably the proceedings of the probate court would have been rejected from the evidence, if a motion to that effect had been made at the trial. They were objected to only as proving conclusively the incapacity of Dorothy Kemp, and the objection was sustained by the court;

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(1) Vide 3 Littell, 78.

(2) 5 Pick. 217.

but the proceedings remained in the case and made part of the evidence committed to the jury. A new trial is not necessarily to be granted because evidence has been introduced into a cause, which, if liable to objection, ought upon motion to have been rejected, not even if such evidence is commented upon by the judge; for it sometimes happens that evidence, which would be inadmissible if objected to, is admitted by consent; and if the judge is not called upon to decide on its competency, it ought to be considered as tacitly assented to."

So, also, in *Pennsylvania*, in *Russel v. Union Insurance Company*.<sup>(1)</sup> 'This cause came on upon a rule for a new trial. The ground was, that the court was mistaken in point of law, in stating that the papers which respected the interests of the plaintiff, in the record of the admiralty court at Halifax, was evidence, and therefore that the plaintiff, not having proved his interest by other evidence, ought not to recover. *Washington*, J., after expressing his regret, that the defendant should have urged an objection which had the appearance of being captious, disposes of the point thus: "If an objection was intended to be made to the evidence of the papers found on board and set forth in the record, it ought to have been taken when an attempt was made to read them, or at any rate before the counsel for the plaintiff had finished his opening. Were a different rule to be pursued, great inconveniencies and irregularities would follow."

And in *Peters v. Phoenix Insurance Company*.<sup>(2)</sup> The court said they would not grant a new trial on a point of law not made at the trial, unless the party would be without remedy if the verdict should stand.

In like manner, it has been ruled in *New-Jersey, Den v. Geiger*, that a party is not permitted to impugn a ver-

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(1) 1 Wash. C. C. Rep. 440.

(2) 3 Serg. & Rawle, 25.



dict in consequence of the introduction of testimony to which on the trial he raised no objection.(1)

The rule however has its exceptions. In *Rich v. Penfield*,(2) it was held, that though an objection was not specifically taken at the trial, if on a case made, it appears that the plaintiff ought not to have recovered, on grounds which if they had been taken, could *not have been obviated*, the verdict will be set aside. This was an action on the case for diverting waters from certain mills. After the testimony was closed, the defendant's counsel insisted the plaintiff was not entitled to recover, because the interest in the mills was either joint in the plaintiff and one Gelston, or in Gelston alone. The judge decided the plaintiff was entitled to recover in his own name alone, and so charged the jury, who found a verdict for the plaintiff. Motion for a new trial on various grounds, and especially that taken by the defendant's counsel on the trial. Upon this, *Sutherland*, J., who delivered the opinion of the court, remarks : "The only interest alleged in the declaration was the possession of the plaintiff, and the only evidence of interest, upon the trial, was that which went to the fact of possession : when the defendants objected therefore that the plaintiff could not recover because the injury proved was, for a part of the period, exclusively to Gelston, the tenant of the term, it was substantially objecting that the plaintiff's proof varied from his declaration. but it was not necessary to put the objection in that specific form. This is not a bill of exceptions, but a case ; and if it appears that the plaintiff ought not to have recovered on grounds which if they had been specifically taken at the trial, could not have been obviated, the verdict should be set aside. Upon this ground, therefore, I am of opinion that a new trial should be granted."

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(1) 4 Halst. 225.

(2) 1 Wendell, 380.

And in a more recent case, *Archer v. Hubbell*,<sup>(1)</sup> the court intimated, if not expressly ruled, on this distinction, that in arguing a case on a motion for a new trial, the counsel were not confined to the objections taken at the trial. In this case, it was urged by the defendant's counsel, that objections to the charge of the judge could not be made on the argument, it not appearing by the case, that the charge was *excepted* to on the trial. In answer it was said, and apparently acquiesced in by the court, that such was the rule as applied to *bills of exceptions*, but not to *cases* which were substituted, in the place of reports of trials made by the judges, and consequently every objection might be urged on a case, which heretofore could be urged on a report made.

But it would appear objections, to the evidence and to the charge of the judge, stand upon a different footing. That as to the latter, exceptions need not be taken to entitle the party to the benefit of them, on a motion for a new trial, especially if he has excepted to the matter upon the introduction of the evidence, which constitutes the exceptionable part of the charge. So ruled in *The People v. Holmes*,<sup>(2)</sup> by *Marcy, J.*, who, delivering the opinion of the court, observes—"It is said that Williams and Merrill cannot now object to the charge of the judge, because they took no exception to it on the trial. If they had stood by in perfect silence, and heard the judge submit to the jury a matter of defence, which was excluded by the pleadings, the court might not listen to them on a motion for a new trial for that cause. Such, however, is not the predicament of these plaintiffs, their counsel having objected to the defence which was not embraced in the issue, when it was offered to be proved, and the judge having admitted it, an objection to the charge, when the judge submitted such defence to

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(1) 4 Wendell, 514, *in notis*.

(2) 5 Wendell, 192.

the jury, was not required to give to the party the right to object to the charge on this motion. 'To have complained of the charge on the trial, would have been but a repetition of an objection once overruled."

To make the rule consistent and just in its application, objections to evidence that might have been obviated if taken, must be excepted. It was accordingly ruled in *Jackson v. Davis*,<sup>(1)</sup> that if an objection which can be obviated by further proof, be not taken or not persisted in at the trial, it will not be received as the ground of a motion for a new trial.

So, in *Jackson v. Christman*,<sup>(2)</sup> the same ground was taken and again ruled in relation to the proof of a will, where the objection was confined to the non-production of the living subscribing witness. Upon this point urged against the verdict, *Sutherland, J.*, who delivered the opinion of the court, remarks:—"This being a verdict subject to the opinion of the court, the court are authorized to draw the same conclusions which the jury would have been justified in drawing from the evidence; and if they would have been justified in finding in favour of the will, even if the witness had been produced and had sworn that it was not subscribed by the witnesses in presence of the testator, the fact may be considered as found by the jury. But I am inclined to think the objection at the trial was not sufficiently specific to raise this question. The reading of the will was objected to on the ground that one of the subscribing witnesses was still living, and ought to be produced. No allusion was made, in corroboration of this objection, to the fact that the attestation was defective. The objection, independently of that fact, was clearly unfounded. The witness may have been in court, and if the substantial ground of the objection had been stated, the

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(1) 5 Cowen, 123.

(2) 4 Wendell, 278.

plaintiff might voluntarily have produced him, or the judge have compelled his production."

This distinction has been taken in Massachusetts, in *Maynard v. Hunt*.<sup>(1)</sup> Writ of entry. Demandant declared upon his seisin in himself, and a disseisin by the tenant. The tenant pleaded several pleas, and had a verdict. The demandant moved for a new trial, because no evidence had been introduced sufficient or proper to maintain either of them, on the part of the tenant, and because all the evidence in the case, the three last pleas, and the admissions of the tenant's counsel, showed that the finding of the first issue for the tenant, was a consequence of finding the other issues in his favour, and that if that issue had stood alone, it would have been found for the demandant. The sufficiency of the testimony was reserved for the consideration of the court. *Parker*, Ch. J., delivered the opinion of the court; and, among other things, upon the point how far objections not taken below are available, observes: "The tenant's counsel has reminded us since the argument, that no objection was taken at the trial to the time of the supposed tender, and he refers us to the case of *Arms v. Ashley*,<sup>(2)</sup> to show that it could not afterwards be raised. But the cases are wholly different. In the case cited, the point was, that a fact capable of proof, but omitted to be proved or called for at the trial, was, on the hearing of the questions reserved, stated as a ground of objection to the verdict. In this case the point on which the cause turns, appears on the record and in the proceedings, and from the tenant's own showing, no other evidence touching it could have been produced had the question been made at the trial, for the tenant's right

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(1) 5 Pick. 240.

(2) 4 Pick. 71.

to tender did not exist until long after a tender could have defeated the demandant's title at law."<sup>(1)</sup>

Another exception is, where, from defect of evidence, whether objected to or not, the party was not entitled to a verdict.

Thus in *Davies v. Morgan*.<sup>(2)</sup> Upon an application by the defendant for a new trial, it was held it ought not to be granted if there be an essential defect in the defendant's evidence, although no objection was made by the plaintiff at the trial upon that point. This was an action of trespass *de bonis asportatis* for seizing shoes. Plea, not guilty, and justification under a bye-law, founded on a custom for the exclusion of foreigners, cordwainers. The jury found for the plaintiff, negating the custom. It was not objected at the trial by the plaintiff, that the defendant had not proved a demand and refusal of the penalty before the distress was levied: but upon the judge's report, the court raised the question whether a new trial could be granted in the face of such a failure of proof. And the decision of the court, delivering their opinions *seriatim*, refusing the motion, is put distinctly on this ground, that the defendants were bound to make out their defence, by showing a demand and refusal before levying the distress, that there was no such evidence to sustain the justification put on the record, and that although no objection was taken to it upon the trial, it was available on the motion for a new trial; and the court was unanimous in the opinion that they ought not to disturb the verdict.

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(1) Vide 4 Wendell, 544.

(2) 1 Crompt. & Jervis, 587.

## CHAPTER VII.

### NEW TRIALS OCCASIONED BY THE WITNESSES.

WHEN the jury is empannelled, and the judge, the parties and the counsel ready to proceed, the testimony comes next in order. Witnesses constitute a most important class in the trial of a cause. The verdict, if just, must repose upon the evidence, and therefore whatever tends to withhold, suppress, derange, falsify or verify the facts, enters into the verdict, and either promotes or subverts justice. It would be in vain to prescribe rules for the government of the parties, their counsel, the jurors and the judges, and leave the witnesses uncontrolled. In the practice regulating new trials, they occupy a distinguished place. Their non-attendance, their mistakes, their interests, their infirmities, their bias, their partial or perverted views of facts, their veracity, their turpitude, pass in review, and in proportion as they severally bear upon the merits, avoid or confirm the verdict. Upon this subject, as upon the others, the rules appear to have varied at different periods. According to the modern practice, they may be regarded as defined and settled, and reduceable to those that follow.

1. The non-attendance of a material witness, or the absence of a material piece of testimony, contrary to reasonable expectation, and satisfactorily accounted for, will induce the court to set aside the verdict, and grant a new trial. Thus,

In *Warren v. Fuzz*,<sup>(1)</sup> it was held, a new trial ought not to be granted for want of evidence, which the party might have had at trial, and had not, but if it be proved that endeavours have been used, but prevented by some unforeseen accident, as sickness of the witness, &c. it may be good cause of new trial.

In an early *Anonymous* case, the court say that when any unforeseen accident happens, or some sudden impediment, as sickness, &c. to a witness, and a trial is had, and a verdict given for the plaintiff, which might have been given for the defendant, had that witness been produced, the court will grant a new trial on terms.<sup>(2)</sup>

So ruled in *Coppin's case*.<sup>(3)</sup> The cause came on at seven in the morning, and an old witness could not rise to be there time enough ; but a new trial was denied, unless he would make affidavit of what he knew, and would answer so that the court might judge of it, and how it was material.

So, in *Doe v. Trapaud*.<sup>(4)</sup> The attorney-general moved for a new trial, on the ground that a witness was called on his subpoena, and did not appear at the moment, but came just before the verdict was given in, and rule granted.

In *Shillito v. Theed*,<sup>(5)</sup> the plaintiff having been nonsuited in consequence of the accidental absence of a witness whom he had subpoenaed, the court set aside the nonsuit, and granted a new trial, on payment of costs ; although *Wilde*, sergeant, objected, that, the nonsuit not having been occasioned by any misconduct on the part of the defendant, he was entitled to retain his judgment.

So, in *Glover v. Miller*,<sup>(6)</sup> the court being satisfied, from the affidavit furnished in the case, that it was not in the power of the plaintiff to produce the receipt against

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(1) 6 Mod. 22.      (2) 11 Mod. 1.      (3) 2 Salk. 645,

(4) 2 Chitty's Rep. 195.

(5) 6 Bingham, 753, and 4 Moore & Payne, 575.

(6) 1 Harp. Const. Rep. S. C. 267.

part of the account, on which the defendant claimed a set-off on the trial, were of opinion, that a new trial ought to be granted.

That this is the practice in New-York, appears from *Ruggles v. Hall*,<sup>(1)</sup> where the witness had been regularly subpoenaed by the defendant, and attended at the circuit, and, shortly before the cause was called on, absented himself without the knowledge or consent of the party, or his attorney, and his absence was not discovered until after the jury was sworn, by which means a verdict passed against the defendant. In this case a new trial was granted, the defendant having shown diligence and the witness to have been material, some stress was laid upon the fact, that neither the witness nor the parties answerable over were solvent.

Yet, in *Alexander v. Byron*,<sup>(2)</sup> where a witness, who was regularly subpoenaed by the defendant, was out of the way when the trial of the cause commenced, and did not appear in court, until after the testimony on both sides had closed, and the counsel for the defendant had proceeded to sum up the evidence. He was then offered to be examined, but was refused by the judge, and a verdict was found for the plaintiff. It was held that the admission of the witness offered was altogether discretionary with the judge, who acted reasonably in refusing to admit him under the circumstances, and that a new trial ought not to be granted.

The question, however, directly passed upon in this case was the exercise of the discretion of the judge on the trial, who refused to open the case.—The rule adopted in *Ruggles v. Hall* would, no doubt, under similar circumstances be regarded as the practice of the court.<sup>(3)</sup>

But where the party must know that a material witness is not to be expected, he ought to apply to have the trial

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(1) 14 Johns. Rep. 112.

(2) 2 Johns. Cas. 318.

(3) Et vide, 1 Tyrwhitt, 49.



postponed ; and if he proceeds with the trial he **must take** the consequences, for on the ground of the absence of the witness, the verdict will not be disturbed. Thus—

In *Letgoe v. Pitt*,<sup>(1)</sup> in ejectment. This cause **was tried** before the lord chief justice at the sittings, and a **verdict** obtained by the lessor of the plaintiff, which the defendant moved to set aside, upon affidavits that some **material** witnesses for him absented themselves, and did not appear upon the trial ; and also prayed the chief justice's certificate, suggesting that the verdict was contrary to evidence. The court rejected the affidavits relating to the witnesses absenting as immaterial.

In *Elmslie v. Wildman*.<sup>(2)</sup> Action on a policy of insurance on goods from Jamaica to London. The ship, during her stay at Jamaica, had been so much exposed to the heat of the sun, that her timbers had shrunk ; and shortly after she sailed on her voyage, she leaked, though there had been no storm, or other probable cause of injury. After pumping, the leak subsided ; the ship made less water every day, and arrived at home in a sound state. The cargo, upon delivery, was found to be damaged. The question at the trial was, whether the loss arose from unseaworthiness, or from the perils of the sea. The defendant called no witnesses, but insisted that he was entitled to a verdict on the plaintiff's case. The jury found for the plaintiff.

It was now moved that this verdict should be set aside, and a new trial granted. on the ground that the captain, a **material** witness for the defendant, had arrived on the day after the trial. But, *Per Gibbs*, Ch. J.—“ In this case an action was brought against the defendant, in whose option it was to apply to put off the trial from the absence of a witness, on the usual terms. That he has neglected to do—and it is fit from justice to the plaintiff, to refuse the present appli-

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(1) Barnes, 439.

(2) 8 Taunt. 236.

cation, because the defendant would have an unfair advantage, in knowing what was the case intended to be set up on the part of the plaintiff, and the evidence to be adduced in support of it.”(1)

In *Alexander v. Byron*, cited above, the sole ground upon which the court put their decision in refusing the motion, is, that the parties must come to trial prepared, at their peril. And, if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. “It has therefore, repeatedly been held,” say the court, “that the subsequent allegation of a party, that he was not prepared, is no reason for granting a new trial, unless it be founded on the discovery of testimony, of which the party was not at the time apprized.”(2)

The practice, in this respect, was fully recognised in *Jackson v. Malin*.(3) Action in ejectment, and verdict for the plaintiff. The defendant moved to set aside this verdict, and that a new trial should be granted, on a case containing the evidence given on the trial, and also on the ground of surprise and newly discovered evidence, supported by affidavits, that William Stewart was a material witness to negative any alteration in the will, and that having been subpoenaed, he did not attend the trial. Upon the ground of the absence of the witness, *Platt, J.*, delivering the opinion of the court, observes: “The affidavits on the part of the defendant, show no grounds for a new trial. There is no newly discovered evidence, nor was there any surprise. The defendant was fully apprized before the trial, of what William Stewart now swears, and actually subpoenaed him; and instead of moving to postpone the trial for the want of his testimony, she voluntarily chose to take her chance without him. Unless there be other grounds, therefore, the defendant must abide by the verdict.”

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(1) Et vide, 1 J. J. Marsh. 590.

(2) Et vide, 1 Caines, 154.

(3) 15 Johns. Rep. 293.

So, in *Peebles and Vaughan v. Overton*,<sup>(1)</sup> the supreme court of North Carolina refused a new trial on the affidavit of the absence of a material witness under such circumstances as would have induced them to refuse a postponement of the cause, for the absence of the witness.

2. The sudden indisposition, and the mistake and surprise of witnesses, have been held grounds for granting or refusing a new trial, according to the circumstances of the case.

In case of sudden indisposition of a witness, or unaccountable confusion of intellect, if there be any ground to suspect practice or imposition in the witness, or speculation on the part of the counsel, the application for a new trial on that ground will be refused, otherwise it will be granted.

This is well illustrated in a recent case in England, as to the first branch of the rule, *Rickards v. Hammond*.<sup>(2)</sup> Action on a promissory note. The defendant's attorney had called for the account and procured payment. Defence that the note was void, founded upon an illegal exaction of poundage, on an execution by the plaintiff's testator, sheriff of the county. The defendant's attorney gave evidence to that effect, admitting on cross-examination that he had always known the facts he swore to. The learned judge, in summing up, animadverted on the conduct of the witness, but said, that if the consideration was originally illegal, the defence must prevail. That the question was, whether the jury would not be disposed to pay greater attention to what the attorney had written, than to the *hurried and confused evidence* which he had there given. Verdict for plaintiff. And now it was moved for a rule to show cause why the

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(1) 2 Murphy, 384.

(2) 1 M'Clelland, 179.

verdict should not be set aside and a new trial had, and that all proceedings in the meantime be stayed. On a joint affidavit of the defendant and his attorney, stating, on the part of the former, that he had never given his attorney any direction to pay the note, or settle it with the plaintiff's attorney. And on the part of the latter, that about an hour before this cause commenced, he was attending a trial at the crown court, when he was suddenly attacked in the throat and left hand with a paralytic affection, which compelled him to leave it. That he went to his lodgings, and sent immediately for medical assistance, having at that time lost the use of his hand and arm as far as the elbow. That by means of embrocations and warm flannel, he obtained relief; but that before the effects were removed, he was obliged to return into the court, in consequence of this cause being called on; and was soon ordered into the witnesses' box, in a most perturbed state. That he was hurried; but it was in consequence of the attack which he had just before experienced; and that he had no pique or enmity against the plaintiff or his attorney. It was submitted that this showed, there had been an injurious decision, not attributable to the person to whom the injury had been caused, which furnished sufficient ground for granting the rule.

*Garrow*, Baron.—“The jury might have presumed that this gentleman had confounded or mistaken some things.”

*Ludlow*, Baron.—“The note was for poundage, and an excess was made out.”

*Hullock*, Baron.—“*Prima facie*, the note was evidence of a debt. Therefore, in order to make out a defence on the ground of vicious consideration, you would have been obliged to show that poundage exclusively was the consideration; but the jury might have presumed that there were other considerations.”

*Per Curiam*.—“This was a case for a jury, and no ground has been laid to induce the court to grant the rule.” Rule refused.

So, if a plaintiff examine his witness and deliver him

over to the defendant to cross-examine, and before any opportunity offer to enable the plaintiff to ask him any questions in explanation, the witness fall down in a fit, and the plaintiff go on to examine other witnesses and try the cause, the court will not afterwards grant a new trial, to give the plaintiff an opportunity of letting in the further testimony of the same witness. In *Depeyster v. The Columbian Insurance Company*,<sup>(1)</sup> on a policy of insurance. On the trial, the master, while on his cross-examination by the defendant, was seized with a fit, and could no further testify; but neither party desired the trial to be put off on that account. There was a verdict for the defendants; and now it was moved to set it aside, and one ground taken was, the sudden indisposition of the witness. Upon which, *Livingston, J.*, delivering the opinion of the court, observes: "A motion for a new trial is made on the following grounds, 1. Because the plaintiffs were deprived of the full benefit of the testimony of one of the witnesses, by reason of his sudden illness. This witness was not seized with a fit until the plaintiffs had examined and given him over to the defendants; but had it been otherwise, they should have suffered a nonsuit. Instead of this, they proceed with the trial, examine other witnesses, and take the chance of a verdict on the testimony then in their power. After this they come too late for a new trial."

It is quite clear from this case, that, should the plaintiff submit to a nonsuit, or the party apply to the judge immediately for relief, and be refused, the court would extend relief.

In *Ainsworth v. Sessions*,<sup>(2)</sup> a petition for a new trial was presented, on the ground that one Payne, who was relied upon as a principal witness in the cause, through surprise, or some unaccountable cause, was so disconcerted

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(1) 2 Caines. 85.

(2) 1 Root, 175.

and confused in his evidence, that neither court nor jury could understand him, whereby the petitioner lost his case; and that said Payne is now able to testify in the clearest manner. Plea in abatement. That said Payne is not a new evidence, and to grant new trials upon the after recollection and additional testimony of former witnesses, would open too wide a door, and be of dangerous consequence. *By the Court*—"Where a party is deprived of his most material evidence by some unaccountable cause, as by being panic struck, or by a paralytic stroke or other affection, which for that time has deranged the recollection of the witness, so that the party loses the benefit of his testimony, reason and justice require, that the party should be relieved against such a misfortune, by a new trial, as much as when he is deprived of his evidence by sickness or absence; but in such cases the court ought to be extremely cautious that they be not imposed upon."

So, the court will relieve against the *mistake* of a witness materially affecting the issue; as in *De Giou v. Dover*.<sup>(1)</sup> Action against the owner of a stage coach for the loss of goods. The coach set out from the *Swan with Two Necks*, Lad-lane, at which there is a board stuck up to give notice, that the proprietors will not be responsible for any parcel above the value of five pounds, unless entered and paid for accordingly. The goods were entered at the Gloucester coffee-house, in Piccadilly, which is a receiving house for this and many other coaches. No intimation was given to the plaintiff that this was not the original office of the coach. The book-keeper of the Gloucester coffee-house, swore, at the trial, that there was not in his office any notice similar to that in Lad-lane. A verdict was accordingly found for the plaintiff. *Plumer* and *Dauncey* moved for a new trial, on an affidavit of the

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(1) 2 Anst. 517.

book-keeper, that he had been mistaken at the trial, and that such notice had been fixed up in his office. *Piggot* and *C. Moore* objected, that this would be a new trial, merely to supply a defect in the evidence, which the defendant ought at first to have provided against. But, per *Macdonald*, chief baron: "Since the argument of this case, we have consulted with Lord Kenyon and several of the other judges, as to the practice, and we find, that where an evident mistake has happened, it is usual to grant a new trial."

So, in *D'Aguilar v. Tobin*,<sup>(1)</sup> cited above; and in *Richardson v. Fisher*.<sup>(2)</sup> A new trial had been moved for in this case, partly on the ground, that the verdict was contrary to evidence, but chiefly on an affidavit from a material witness, that he had made a serious mistake in giving his testimony. Vaughan, sergeant, showed cause against the rule. *Per Curiam*—"If there were nothing else in this case, there must be a new trial on the important affidavit, that the witness has made a mistake."

And, in *The Inhabitants of Warren v. The Inhabitants of Hope*,<sup>(3)</sup> it was held, that a new trial will be granted, where a material witness, whose testimony at the trial was against the interest of the petitioner, has since discovered that he testified incorrectly by mistake.

But, in *Kellen v. Benett*,<sup>(4)</sup> the court refused to grant a new trial on an affidavit, that a witness (called on the part of the defendant, and who had refused to release an interest which rendered him incompetent) had misapprehended the effect of the release, and was now ready to execute one. Action for seaman's wages. On the trial the captain of the ship was called as a witness for the defendant, who refused to release his interest, and a verdict, therefore, passed for

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(1) 2 Marshall, 265. *supra*, p. 182.

(2) 1 Bingham, 145.

(3) 6 Greenl. 479.

(4) 4 Bingham, 171.

the plaintiff. Motion for a new trial, upon an affidavit by the captain, that he did not at the trial understand the meaning of releasing his interest; that he was now ready to release it; and that, in truth, he had no interest. It was urged, that the defendant had not sworn to merits; that the captain's interest was clearly established, and that it would be a most dangerous precedent to permit a witness thus to retract what he had said at the trial. And, *Best*, Ch. J. having intimated, that the nature of the required release was repeatedly explained to the captain at the trial; *The Court* thought it would be too much to disturb the verdict, upon such an affidavit, when from the absence of any deposition to merits, it was probable the result of a second trial would not differ from that of the first, and when the witness in question must be placed in the box, under circumstances so suspicious.(1)

With this agrees the spirit of the decision in *Depeyster v. The Columbian Insurance Company*,(2) and cannot be said to be at variance with the general principle, that on all such applications, ought to govern the discretion of the court, inclining them to relieve whenever the mistake, surprise or accident occurs, without blame or suspicion, in a material part, and the party has merits, and would be otherwise without relief.

Upon this principle the court acted, and furnished a strong example in *Hewlett v. Cruchley*,(3) where the defendant was surprised by the evidence of a witness. Action for a malicious prosecution. The defendant was an attorney. The plaintiff had been for fourteen years his clerk, whom he afterwards had indicted in seven bills for embezzlement, but declined to give evidence, and the plaintiff was, of course, acquitted. Upon this, the present suit was brought, and upon the part of the defendant, to show that there was

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(1) Vide *Sayre*, 27. (2) 2 *Caines*, 85. (3) 3 *Taunt.* 277.



a probable cause for the prosecution, it was proved that a case had been laid by the defendant before a barrister, who was examined as a witness, upon the subject of preferring the indictment. He however stated that he believed that the case exhibited to him at the trial, was not the whole of the case laid before him for his opinion; that more papers had been laid before him, and that a strong case had been stated. He mentioned having given an opinion in writing, which was not annexed to the case then produced; and that the case on which he advised, stated the names of the parties, which this paper did not contain. The court charged there was no probable cause, and verdict for the plaintiff, £2000 damages. Motion for a new trial; and one of the grounds urged was, that the evidence given, with respect to the case, was completely different from that which the defendant had reason to expect, and was a surprise on him; that the witness before whom the case had been laid for his opinion, previous to the prosecution, had been mistaken in his recollection, and that no other case or written paper had ever been laid before him, than that which was produced on the trial, which was annexed to the affidavit. And, per *Mansfield*, Ch. J.—“As to the ground of surprise, was it ever put to the decision of a court, that when the defendant has called witnesses, and they proved contrary to his expectations, what was false and contrary to truth, the defendant should therefore ask a new trial? Such a thing was never heard of.” *Heath*, J.—“As to the evidence of the barrister, if it clearly appeared to my satisfaction that the witness was surprised, and gave evidence contrary to the expectation he had raised, I would send it to a new trial; but no such a thing appears.” *Chambre*, J.—“I entirely agree that the court ought not in this case to interfere with the province of a jury; although there are cases in which the court may properly do that, but this is not one of them.”(1)

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(1) Et vide, 3 Marsh. Kent. Rep. 85.

3. Neither a direct impeachment of the veracity of the witnesses, nor affidavits of perjury, nor even an indictment for conspiracy or perjury, unless the case is so gross as to make it probable the verdict was obtained by perjury, or that the false testimony occasioned a surprise upon the party, will be sufficient cause to set aside a verdict, and grant a new trial. (1)

In the *King v. Heydon*, (2) it was held, that a witness indicted for perjury was not a reason to postpone judgment against the person convicted. The defendant was convicted of bribery, and it was now moved to postpone judgment, till an indictment, which he had preferred against one Burbage, for perjury in his evidence, was determined. Norton, solicitor general, and Morton, showed for cause, that this was a motion of the first impression, and of very dangerous consequence, merely to delay justice. That the perjury assigned in the indictment is not in respect of the fact, for which Heydon is convicted, but a collateral circumstance :—that Burbage offered to take his trial immediately after the indictment found, but the defendant refused to consent to it ; and, after deliberation had, per Lord Mansfield, Ch. J.—“ I am clear, that Heydon can be no witness in this case, if they mean by this indictment to alleviate the judgment of the court for the bribery, because he is swearing in his own cause. And the witnesses on the indictment having all been previously examined at the former trial, makes an end of this motion ; for their credit has already been weighed by a jury, and found wanting.”

In *Benfield v. Petrie*. (3) Action of debt on the statute against bribery, and verdict for plaintiff. A rule to show cause why there should not be a new trial had been obtained on an affidavit of the defendant, which stated that

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(1) 2 Tidd, 914. (2) 1 W. Black. 404. (3) 3 Doug. 24.

two of the plaintiff's witnesses at the trial, whose names were Wilks and Shilling, had been indicted for perjury in this cause on the evidence of several persons, and that true bills had been found. Lord *Mansfield*—"This is an action for bribery. All the facts given in evidence go on the ground, that two persons were agents, and that the bribery was committed by them. Evidence of these facts was given by seven or eight persons besides the parties indicted, and both the persons, who bribed, were examined for the defendant at the trial. The jury found a verdict for the plaintiff, against the evidence of these two persons, on grounds which impeach that evidence. The judge, who tried the cause, is satisfied with the verdict, and, therefore, it stands as a verdict with the weight of evidence in its favour. The motion for a new trial rests solely on the ground, that two of the witnesses have been indicted for perjury. It is not an established rule, that it is, of course, to stay a verdict, because the witnesses in support of that verdict have been indicted for perjury."(1)

So, in *Wheatly v. Edwards*.(2) Action of *crim. con.* and verdict for plaintiff. On a motion for a new trial, there was strong evidence of perjury in the witnesses to the criminal conversation on express testimony against them. Lord *Mansfield* particularly observed, there was direct testimony of subornation of perjury by the plaintiff's consent, of the witnesses; and this in different places, by three different witnesses. On the other side, four persons swore to the character of one of the witnesses who was living, and who swore the other was dead, and that he had seen him in his coffin, and there was a witness who swore that this man was alive; and yet his lordship said, that there appeared no ground on the evidence for granting a new

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(1) Et vide, *Macpherson v. Petrie* and *Petrie v. Miles*, 3 Doug. 26 and 27.

(2) Lofft, 87.

trial ; but that they might proceed by indicting the witnesses for perjury.

And with this the modern practice agrees. In *Warwick v. Bruce*,<sup>(1)</sup> the plaintiff obtained a verdict for £150, and had judgment, upon which the defendant brought error, and after argument, judgment was affirmed. But before the case came on to be heard in error, the defendant preferred an indictment against two of the plaintiff's witnesses for perjury in their evidence at the trial, and on a former day in this term, obtained a rule *nisi*, for staying execution upon the judgment until the trial of this indictment, upon an affidavit made by himself, charging the said witnesses with perjury. But per Lord *Ellenborough*, Ch. J.—“It would be highly dangerous to allow this rule to be made absolute, for this would be a receipt to every person, after verdict and judgment against him, how to delay the fruit of such judgment, by indicting some of the plaintiff's witnesses for perjury. And should this rule be made absolute, it would, perhaps, prevent the plaintiff from being a witness at the trial of the persons indicted.” And because this seemed to be a new and dangerous experiment, the court directed the rule to be discharged with costs.<sup>(2)</sup>

So, also, in *Seeley v. Mayhew*.<sup>(3)</sup> Assumpsit against the defendant, as acceptor of a bill of exchange, drawn by T. Parish. The defendant's handwriting having been proved, the defence was, that the bill had been given for a horse sold by Seely to Parish, which was warranted sound, but was ill at the time, and shortly afterwards died. The jury having found a verdict for the defendant, *Addoms*, sergeant, now moved for a new trial on the ground of surprise, the defence not having been anticipated, and true bills for perjury having since been found against the witnesses, who spoke to the warranty, and the property of the

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(1) 4 Maule & Selw. 140.

(2) Vide, 4 Taunt. 640.

(3) 4 Bingham, 561.

horse being in Seeley. But the court thought that was a circumstance of which they ought not to take notice ; and observing, that Lord Mansfield and Lord Erskine had expressed the greatest disapprobation of indicting witnesses while a cause was yet pending, refused the rule.

And, in *Pott v. Parker*.(1) Motion to set aside verdict for plaintiff. There was a sale of wheat, and the only question was, whether the price of it had been paid. There was contradictory evidence, and an indictment for perjury had been found against the witnesses for the plaintiff, and the character of the defendant was at stake. And per Lord *Ellenborough*, Ch. J.—“ It was a question upon the credit due to the witness, and it was left to the jury. To grant a new trial on the ground that an indictment for perjury has been found, would be new and dangerous. The only thing possible would be, to stay execution during the finding of the indictment for perjury, but that we cannot grant.”(2)

And it has been held, that even a conviction for perjury will not induce the court to stay proceedings, much less to set aside the verdict.(3)

To the universality of the rule, there have been cases held as exceptions. Of this kind is *Fabrilius v. Cock*.(4) But there the whole case resolved itself into a fiction, to the entire satisfaction of the court. The case was this. The plaintiff sued in *trover* for 6,000 pagodas. The defendant always denied the whole story, but was not able to contradict the proof at the trial. The jury, to the satisfaction of Lord *Mansfield*, found a verdict for the plaintiff for £2,400, the value of the pagodas. The defendant moved for a new trial, upon the ground that the whole was a fiction supported by perjury, which he could not be prepared

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(1) 2 Chitty's Rep. 269. (2) Sed vide, contra, 1 Greenl. 322.

(3) 2 Price, 3. Et vide, 9 Price, 89.

(4) 3 Burr. 1771.

to answer. That since the trial, many circumstances had been discovered to detect the iniquity, and to show the subornation of the witnesses. The court, after a very strict scrutiny, granted a new trial on payment of costs. The justice and propriety of this determination appeared in a very strong light to many persons, who thought the whole story to be manifestly a scheme of villany supported by perjury. And the plaintiff never dared to try it again.

So, if the perjury or conspiracy is rendered probable, and the testimony must have operated as a surprise, as in *Thurtell v. Beaumont*.<sup>(1)</sup> In the first instance the court refused to grant a rule *nisi* for a new trial, on the ground that subsequently to a verdict for the plaintiff, the grand jury had found a bill against him and others, for a conspiracy to defraud the insurance company. But on affidavits disclosing the conspiracy itself, and showing that the defendant did not obtain a knowledge of it till after the trial, so that the plaintiff's case was in effect a surprise on him, the court granted a rule *nisi* for a new trial, on payment of costs.

And in *Morrell v. Kimball*.<sup>(2)</sup> A new trial was granted, on the ground of the perjury of the party's own witness, evidently a strong example of *surprise*. The reasons and the ground taken in opposing the motion are sufficiently explained in the opinion of the court, by *Weston, J.*—"It has been made to appear in the present case, highly probable, that in the action originally tried between these parties, the petitioner for a review would have prevailed, but for the testimony of *Daniel Philbrook*. It further appears that in giving this testimony, Philbrook was guilty of wilful and corrupt perjury, of which he has been since convicted, and is now suffering the punishment awarded against him. Upon these facts the petitioner appeals to the

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(1) 1 Bingham, 337.

(2) 1 Greenl. 322.

egal discretion of this court, praying that a writ of review may be granted him, that the cause may be again examined upon its merits, and that justice may be done between the parties. If the judgment rendered against the petitioner was obtained by perjury, he is not the less injured because it was not committed, in consequence of the procurement, subornation, or even privity of the adverse party. Though the latter may have been innocent of any charge of this nature at the time, it is more than questionable whether he can, *in foro conscientia*, continue to enjoy the fruits of the perjury, after it has been made apparent. As to the last objection, it is clearly a rule of law, that the party calling a witness shall not be permitted to attack his character by general evidence; yet he may, by other witnesses, disprove the facts to which he testifies. If therefore the facts thus testified to are directly proved to be false, there is no principle of law or of justice which prevents the party from availing himself of the truth of his case, although the credit of his own witness may thereby be impeached. New trials have been frequently granted, where there has been strong reason to suspect that perjury has been committed; much more ought they to be where the perjury has been clearly demonstrated."

But there being no allegation of surprise, the motion was refused in *Proctor v. Simmons*.<sup>(1)</sup> Action for an assault. At the trial, the plaintiff called two of her children and her sister as witnesses, to prove that the defendant had been guilty of an outrageous assault, in order to entitle her to large damages. The jury, however, found a verdict for her, damages one shilling only. On motion for a new trial on affidavits, that two of the witnesses had been guilty of gross perjury at the trial, the court observed, "That as the defendant had not sworn that he had been taken by surprise at the trial, there was no ground for the appli-

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(1) 9 Moore, 581.

cation; and that it would be a dangerous precedent to grant a new trial on the mere affidavit of the one party, that the witnesses of the other had been guilty of perjury."

So far the principle of the rule has been adopted in New-York. In *Jackson v. Rowland*,<sup>(1)</sup> in ejectment, witnesses were called on the trial to impeach the character of one Hay, for truth and veracity, a witness for the plaintiff. The jury found for the defendant on a case reserved. One point urged for setting aside the verdict, was, that Hay was discredited, and it was held that a subsequent impeachment of a witness cannot be insisted on in support of a motion for a new trial. "The character of the witness," say the court, "should have been attacked before the parol evidence was given; for should the judge have discredited his testimony, the plaintiff, for aught appearing to the court, might have offered other proof to the same point."

It is to be presumed that objections to a witness, on the ground of an indictment for a felony, would be at least as unavailing on a motion for a new trial, as an attempt to impeach him for that cause was held to be at the trial. In *Jackson v. Osborne, ex dem. Gibbs*,<sup>(2)</sup> in ejectment, one Joel Wood, a subscribing witness to a deed, was called to prove it. The defendant, for the purpose of impeaching the testimony of Joel Wood, upon whose oath the deed to Gibbs had been proved before the commissioner, offered to prove that two bills of indictment were found by a grand jury against him, one charging him with perjury, and the other with forgery, committed by him in relation to the premises in question; that he had absconded, and had ever since remained out of the territory of the United States, for which reason, he had not been tried; that subsequent to the indictments, and before the

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(1) 6 Wendell, 666.

(2) 2 Wendell, 555.



commencement of this suit, Gibbs in person procured Wood, to make the proof, before the commissioner, certified on the deed. This testimony was objected to, by the plaintiff's counsel, and rejected by the judge. There was a verdict for the plaintiff, and on motion to set it aside, one of the points taken was, the rejection of the testimony offered to impeach Wood. Upon this the court observe: "The evidence offered to impeach the witness to the deed, was properly rejected. That he had been indicted for perjury and forgery, did not affect his competency, not having been tried and convicted. The credibility of a witness is not to be impeached by proof of a particular offence, but by evidence of general bad character. If it was not competent to prove that the witness had perpetrated the offences for which he had been indicted, (of which there could be no question,) it follows of necessity that the fact of his having been indicted was inadmissible evidence." (1)

4. Intimately connected with the preceding rule is this, that a new trial will not be granted, to furnish an opportunity, to impeach a witness, upon a subsequent discovery of his interest or turpitude, or general bad character.

Thus, in *Turner v. Pearte*. (2) Action for withdrawing suit from mills of plaintiff, and verdict for defendant. Motion for a new trial upon two grounds:—*First*. That it was a verdict against evidence. *Secondly*. Upon an affidavit, that it had been discovered since the trial that five out of nine of the witnesses on the part of the defendant were interested in the event of the cause, and, therefore, were incompetent, and ought not to have been received. The court, being of opinion that the weight of evidence was in favour of the verdict, discharged the rule on that ground; but first gave their opinions upon the other point, *seriatim*. *Ashhurst, J.*—"The regular time for objecting to the com-

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(1) *Et vide*, 2 Marsh. Kent. Rep. 130.

(2) 1 Term Rep. 717.

petency of witnesses is at the trial. The ancient doctrine on this head was so strict, that if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that strictness may, in some degree, be relaxed, by the custom of suffering witnesses to be examined conditionally, which is only waiving the objection for the time. But still the objection must be made at the trial." *Buller, J.*—"There has been no instance of this court's granting a new trial, on an allegation that some of the witnesses examined were interested, and I should be very sorry to make the first precedent. Anciently, no doubt, the rule was, that if there were any objection to the competency of the witness, he should be examined on the *voir dire*; and it was too late after he was sworn in chief. In later times that rule has been a little relaxed; but the reason of doing so must be remembered. It is not that the rule is done away, or that it lets in objections which would otherwise have been shut out. It has been done principally for the convenience of the court, and it is for the furtherance of justice." *Grose, J.*—"If this objection had been made before me at the trial, perhaps I might have admitted it; but then, by the rule of law, objections of this nature must be made at the trial. And if the plaintiff will insist upon the strict rule relative to the incompetency of witnesses, the defendant has an equal right to avail himself of the rule that the objection now comes too late."(1)

So, in *Sells v. Hoare*,(2) *Vaughan*, sergeant, for the defendant, moved for a new trial in this cause, on the ground, among others, that a person calling himself Joseph Manning, had been duly sworn on the gospels, as a christian; whereas, it had been discovered since the trial, that his real name was Solomon Money, that he was a Jew before and

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(1) Et vide, *Soulet v. Loiseau*, 6 Mart. Lou. Rep. 512.

(2) 3 Brod. & Bing. 232.

at the time of the trial, and that he was still a regular attendant at the synagogue. The learned sergeant urged that the jury, in coming to the conclusion which they had done, must have believed the testimony of this witness, who had given his evidence under a sanction, which he could not, from his religion, consider binding. But the court held that the objection came too late, and that it would be productive of great danger and confusion, if such affidavits were received.

In this state, the rule has been adopted. In *Bunn v. Hoyt*,<sup>(1)</sup> a motion was made to set aside the verdict. One ground was on newly discovered evidence, tending to impeach the credit of the material witness. But, *Per Curiam*—"A verdict is never set aside to give the party an opportunity, of impeaching the credit of witnesses sworn at a former trial. The evidence should be of some material fact, which would induce the belief, that if proved to the jury, it would so far influence their minds, as to produce a different verdict."

So, in *Shumway v. Fowler*.<sup>(2)</sup> Seduction case, and verdict for the plaintiff. After the trial, evidence tending to discredit the daughter of the plaintiff, the principal witness was discovered, and a motion made to set aside the verdict and grant a new trial. But refused, the court reiterating the rule—"A new trial is not to be granted merely on the discovery of new evidence, which would impeach the character of a witness at the trial. There would be no end of new trials on that ground."<sup>(3)</sup>

To this, there has been an exception, in *Jackson v. Kinney*,<sup>(4)</sup> where it was held that, although in general a new trial will not be granted on the ground of newly discovered evidence, when it goes merely to impeach the testimony of

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(1) 3 Johns. Rep. 255.

(2) 4 Johns. Rep. 425.

(3) Et vide, 5 Johns. Rep. 248.

(4) 14 Johns. Rep. 186.

a witness at the former trial, yet in causes concerning the title to military lands, where the identity of the original patentee is in question, a new trial may be granted, to give the defendant an opportunity of impeaching the character of the principal witness for the plaintiff, especially when the defendant has been a long time in possession.(1)

So in *Waite's* case,(2) in Massachusetts. The defendant was indicted and convicted of forgery. He moved for a new trial, on the ground of an improper conviction. The facts appear in the opinion of *Parsons*, Ch. J.—“*Richardson*, whose receipt the defendant is charged with forging, was sworn as a witness, and as he could neither gain nor lose by the event of the trial, as it then appeared, he was properly admitted. The motion is therefore rested on two grounds.—That the defendant has since obtained evidence that *Richardson* was incompetent; or if he was competent, that the defendant now has evidence further to discredit him. As to any further evidence against *Richardson's* credibility, it cannot in this case avail the defendant. At the trial, he must have expected, that *Richardson* would be called by the solicitor general, and he does not pretend that he was then surprised by the testimony of this witness. He expected it, and he attempted by the testimony of witnesses to destroy his credit, by proving that his general character as to truth was bad.—To give time to the defendant to scrutinize a neighbourhood, and discover some who may testify to a witness's *general bad character*, which if the testimony be true must be generally known, would be preposterous and dangerous.”(3)

So, in *Hammond v. Wadhams*,(4) where a witness on a trial was not unexpected by the party against whom he was produced, and his character was discredited, the court would not grant a new trial on the ground that the party

(1) Accord. 3 Greenl. 92.

(2) 5 Mass. Rep. 261.

(3) Et vide, *Drew's* case, 4 Mass. 399.

(4) 5 Mass. Rep. 353.

had since the trial discovered further evidence of his want of credit. *Parsons*, Ch. J.—“It is not suggested by the demandant that he was surprised by Fanning’s testimony. On the contrary he came prepared to discredit him, which he effectually did in the opinion of the judge. ‘To grant a new trial to give further opportunity to discredit a witness, whose testimony was not unexpected, and who had in fact been discredited, would be unprecedented, and productive of mischievous consequences. We cannot, therefore, grant a new trial on the second ground on which it was moved.’”

So held in *Maine*, in *Keen v. Sprague*,<sup>(1)</sup> say the court, “A new trial will not be granted for the purpose of discrediting a witness by showing contradictory testimony from his own deposition given at an early stage of the same cause, the deposition being on the files of the court, but accidentally omitted to be read. The court, in denying the motion, lay stress upon the fact that the counsel for the defendant knew of the existence and contents of the deposition, and in communicating the facts to the counsel who tried the cause, it was incumbent on him to have stated this also.”

And in *South Carolina*, in *Lloyd v. Monpocy*,<sup>(2)</sup> where a new trial was moved for on the ground that one of the witnesses was bribed, who swore to the fact, the motion was, notwithstanding, denied, the court observing: “But the most substantial ground, and indeed the only one on which the court has had any difficulty, is the sixth: the facts stated in that ground are attempted to be supported by the affidavit of the witness herself, that she had been bribed, and had sworn falsely on the trial. It would be a sufficient objection to the admission of this affidavit, that a copy of it has not been given to the person accused of the subornation

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(1) 3 Greenl. 77.

(2) 2 Nott & M'Cord, 446.

of perjury, that the charge might be rebutted. But even waiving that objection, I do not think it ought to be received. The discovery of parol evidence after a trial, has never been admitted in this state, as a good ground for a new trial. The tampering with witnesses, to which it would lead, the frauds and perjuries which it would introduce, and the endless litigation which would ensue, admonish us to be careful how we depart from that long settled, and, I think, safe and necessary rule."

But when the facts, on which the witnesses found their testimony, are clearly falsified by affidavit, the verdict will be set aside. The reason of this distinction is manifest; tampering with witnesses may pervert the truth, but cannot change facts.

In *Lister v. Mundell*.<sup>(1)</sup> In this case a writ of *fieri facias* issued against the defendant, a bankrupt, before certificate obtained, but not executed till after. To invalidate the effect of the certificate, it was stated, that the defendant had lost more than £5 on one day by horse-racing, and to try this a plea of bankruptcy was directed. At the trial, to prove the money lost, the plaintiff produced three witnesses, all of whom swore to the fact of the money having been lost in 1793, and two of them founded their testimony on particular circumstances within their recollection, viz: *Thomas Dinnis*, that, till 1793, he had lived at Hunmanby, in Yorkshire, and on his leaving that place, had come immediately to Scarborough; and *William Dove*, that a child of his died about a month before the race in question took place. Verdict for the plaintiff. And now a rule *nisi*, for a new trial, was moved for, on affidavits contradicting the particular circumstances on which the two witnesses, above-mentioned, founded their testimony. The court observed, that though it was unusual to grant a new

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(1) 1 Bos. & Pul. 427.

trial on evidence contradicting the testimony on which the verdict had proceeded, discovered subsequent to the trial, yet as the very facts on which these witnesses had founded themselves, were falsified by the affidavits produced, they thought it afforded a sufficient ground for a new trial, and accordingly granted a rule *nisi*. Against this, *Le Blanc* was now to have shown cause, but on a question from the court, he admitted that he could not contradict the affidavits which had been produced ; and therefore the court made the rule absolute.

And it would appear, that if a party admitted his having bribed a witness, or the witness himself should put that by affidavit before the court, it would avoid the verdict, but not if the witness should only declare it.

In *George v. Pierce*. In order to a new trial an affidavit was read, that one of the witnesses had declared that he had gotten a guinea to stifle the truth. *Gould*—"An affidavit of him who had the guinea were something, but his saying is nothing. A witness' laying a wager in the cause is no hindrance to his being a witness, for the other has an interest in his evidence, which he cannot deprive him of."(1)

So, in a clear case of the infamy of a witness, on whose testimony the case chiefly turned, to prevent palpable injustice, a new trial will be granted, to allow an opportunity of eliciting the merits of the case, and correcting the suspected evidence.

As in *Goodtitle v. Clayton*,(2) where an attesting witness to a will had sworn against her own attestation. A new trial was directed, *Lord Mansfield* observing—"I have several cases, both upon bonds and wills, where the attestation of witnesses has been supported by the evidence of the other witnesses, against that of the attesting wit-

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(1) 7 Mod. 31.

(2) 4 Burr. 2224.

nesses who denied their own attestation. It is of terrible consequence, that witnesses to wills should be tampered with to deny their own attestation. 'Therefore let the rule be made absolute, for setting aside this verdict.'

And in *Allen v. Young*,<sup>(1)</sup> a new trial was granted upon the ground that the verdict was founded upon the testimony of a witness of infamous character. The testimony was as to the admissions of the defendant. "The species of confession deposed to by Caldwell," says *Bibb*, Ch. J., "is in itself the weakest and most unsatisfactory of all testimony deemed competent in law, on account of the facility with which it may be fabricated, and the difficulty of disproving it, if false, by direct negative proof. But the confession of Allen is deposed to by William Caldwell, who by his own account, was at the time engaged in counterfeiting and fabricating a letter, as if from a man in Alabama, to Young, who by the deposition of himself had escaped from jail, under a prosecution for passing counterfeit money, and was then under the impending prosecution—who by his own confession, and by general reputation, was associated with a band of counterfeiters, and by the testimony of respectable witnesses, is of infamous character. It is due to the pure administration of justice, to example and effect in society, that a verdict based exclusively upon the testimony of a confession, sworn to by such an infamous witness, should not stand. It would be vain to attack the credibility of a witness, if evidence of such depravity and infamy is to be of no avail with the court. 'The juries will do their duty, and exercise their powers; the court must do theirs in supervising the verdicts of juries.'"<sup>(2)</sup>

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(1) 6 Monroe, 136.

(2) Et vide, *Smelling v. Utterback*, 1 Bibb, 611, and *Morris v. Morris*, 2 Bibb, 311.



## CHAPTER VIII.

### NEW TRIALS, FOR THE ADMISSION AND REJECTION OF TESTIMONY.

IN the distribution of a trial, it is the province of counsel to manage the cause; of the jury to find the facts, and of the judge to dispense the law. In the progress of the trial, questions of law upon the evidence spring up in constant succession, and in the charge of the judge, the attention of the jury is called to the principles of law, applicable to the facts upon which they are to pass. In the hurry of a trial, where rules of law pass in rapid review, it is not unusual, for the most enlightened judges, to mistake the point presented, or the precise extent to which the principle of law ought to apply. They are compelled to decide rapidly,—seldom with the advantage of enlightened argument; often upon a confused statement, and always upon their own resources. The consequence is, that testimony is frequently admitted, that ought to have been rejected, and *vice versa*. The true legal principle is mistaken, and that unerring precision, essential to a perfect administration of justice, cannot be attained. Not unfrequently ignorant, inattentive and partial judges, for such will be found in every community, misapprehend or pervert the law, and occasion gross injustice. To remedy this evil, the law has confided to the court in bank the power of setting aside the verdict, in which all the errors of the trial finally meet and concentrate. The errors of the judge at the trial are resolvable into three classes: the admission of illegal testimony, the rejection of legal testimony, and the misdirection of the jury in matters of law. The two former will constitute the subject of the present chapter.

1. If the judge at the trial decide to admit illegal testimony on the merits, the verdict will be set aside and a new trial granted. Thus,

In *The Queen v. The Inhabitants of Wilts*,<sup>(1)</sup> upon debate on a motion for a new trial, where the issue was, whether the county of Wilts at large, or the town of L., within the county, was obliged to repair the bridge of L., in that county. An order of sessions, formerly made upon the inhabitants of L. to repair, was offered in evidence for the county at the former trial, and rejected upon this reason, that the justices of peace have no jurisdiction over highways, but upon a presentment, and none had been, to warrant this order. It was declared by the court, that it is a good cause to grant a new trial, that the judge who tried the cause overruled good, or admitted that which was no evidence, and that, although the other party has a remedy by bill of exception.

In *Thomkins v. Hill*,<sup>(2)</sup> it was agreed by the court, that if any judge of *nisi prius* allow, or overrule evidence, which he ought not to do, upon application to the court they will grant a new trial; for all writs of *nisi prius* are under the control of the court, out of which they issue.

And in *Tutton v. Andrews*,<sup>(3)</sup> where the sheriff, on the execution of a writ of inquiry of damages, admitted improper evidence to be given by defendant, whereby the damages were lessened, the court ordered the inquisition to be set aside, and gave plaintiff leave to execute a new writ of inquiry. The court added, "A notion has prevailed, that where damages are excessive, a new trial, &c. may be granted, but not where damages are less than they ought to be, though there is as much reason for a new trial, &c. in the one case as the other."

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(1) 6 Mod. 307.

(2) 7 Mod. 64.

(3) Barnes, 448.

In *Doe v. Perkins*,<sup>(1)</sup> in ejectment, the only question at the trial was, at what time of the year the annual holdings of the several tenants expired. One Aldridge was produced as a witness for the plaintiff, who stated that he went round with the receiver of the rents to the different tenants, whose declarations, respecting the times when they severally became tenants, were minuted down in a book at the time, some of the entries being made by Aldridge, and some by the receiver. When Aldridge was examined, the original book was not in court. He spoke concerning the dates of the several tenancies, from extracts made by himself out of that book, confessing upon cross-examination that he had no memory of his own upon those specific facts; but that the evidence he was giving, as to those facts, was founded altogether upon the extracts which he had made from the above-mentioned book. This evidence was objected to, at the time, upon the ground that, as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book from whence they were taken ought to be produced. The evidence was admitted, and the plaintiff had a verdict. A new trial was moved for, on the ground of the admission of this testimony. After argument, the court did not appear to entertain much doubt, as to the inadmissibility of the evidence; but they said that as it was a matter of such general practice, they would consider of it, that the rule might be finally settled. At a subsequent day, Lord *Kenyon*, Ch. J., said, "That the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that, comparing this case with the general rule, the court were clearly of opinion, that Aldridge, the witness, ought not to have been permitted to speak to facts from the extracts

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(1) 3 Term Rep. 749.

which he made use of at the trial." And, *Per Curiam*—  
"Rule absolute for a new trial."(1)

This rule has been held in the state of New-York, to apply to a judgment in error, where improper evidence has been admitted, although only accumulative. In *Marquand v.*

*Webb*, (2) which was an action of repairs to a certain vessel, the plaintiff produced one Gomez as a witness, who being sworn on his *voire dire*, testified, that he was a part owner of the vessel when the repairs were made. The defendant's counsel objected to the witness, as interested; but the judge permitted him to be sworn in chief, and being sworn he gave material testimony against the defendant. *Spencer, J.*, to counsel *arguendo*, that there was sufficient legal testimony left, "suppose improper evidence has been admitted, and though the evidence was, in our opinion, fully sufficient to entitle the plaintiff to recover, are we authorized to say that the jury disregarded the improper evidence?" And delivering the opinion of the court, he remarks—"The whole case turns on the competency of the witness, Benjamin Gomez; and although the fact proved by him, was proved by two other witnesses, we cannot say, the case coming before us on a writ of error, that his evidence may be rejected as unnecessary.—The witness being confessedly, by his own admissions, on the *voire dire*, a part owner, would be answerable in contribution, and his interest in making the defendant below an owner, was promoted, by increasing the number of those chargeable, and thereby mitigating his own loss. I have met with no case directly in point. My opinion proceeds on the principle, that whenever a fact is to be proved by a witness, and such fact be favourable to the party who calls him, and the witness will derive a certain advantage from establishing the fact, in the way proposed, he cannot be heard, whether the benefit be great or small."

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(1) Vide *Sandwell v. Sandwell*, Holt, 295.

(2) 16 Johns. Rep. 89.

So, in *Osgood v. The Manhattan Company*,<sup>(1)</sup> in error from the supreme court. Evidence was produced at the trial, to show that, at the time of a certain conveyance to her daughters, Mrs. Osgood was insolvent; and for that purpose the plaintiffs produced the petition of her executors to the surrogate, stating, that the personal estate of the testatrix was insufficient to pay her debts; to which was attached an account between the executors and the estate, and of the personal property and debts of the testatrix. These accounts were sworn to by the executors; but before any order was made by the surrogate upon the petition, they had declined proceeding farther. The admission of this testimony was objected to, but received by the judge. Verdict for the plaintiff, and judgment. The cause came before the court on a bill of exceptions, containing, among other things, the point, on the admission of evidence. And per *Sudam*, senator, who delivered the leading opinion, in which the members of the court unanimously concurred, "It is well settled, that, if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for we cannot say what effect such evidence may have had on the minds of a jury." And after applying this rule, and commenting upon the exceptionable nature of the testimony objected to, he concludes—"On the whole, I am of opinion that the evidence was improperly admitted; that the judgment must therefore be reversed; that the record be remitted, and a *venire de novo* issue from the court below."<sup>(2)</sup>

But where the evidence is clearly inadmissible and goes to the merits, not supported or subsequently supplied by legal testimony, no question can arise. It presents a case so flagrant, as to induce the court to grant relief even to the setting aside of the verdict, on the application of the

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(1) 3 Cowen, 612.

(2) Et vide, 2 Hall's Rep. 40.

party in whose favour it has been found, if manifestly prejudiced by the admission of the illegal testimony.(1) As in *Foster v. Smith*.(2) It was an action of trespass. The defendants had suffered judgment by default. On the inquest before the sheriff and a jury, they offered evidence to show, that in fact, the defendants had committed no trespass, which was objected to, but admitted. The jury found a verdict for the plaintiff, with nominal damages, who now moved to set it aside on the ground of the admission of illegal testimony. And per *Nelson, J.*, delivering the opinion of the court: "We are of opinion the testimony was inadmissible. The default admitted all the material averments properly set forth in the declaration, and of course the false imprisonment, and every thing essential to establish the right of the plaintiff to recover. The only debatable question left for the examination or consideration of the jury, was, the amount of damages, and that ought to have been examined and decided, on the assumption that the false imprisonment had been committed by the defendants. Any evidence tending to prove that no right of action existed, or denying the cause of action, was irrelevant and inadmissible.—If this practice was tolerated, it would enable defendants to have substantially the benefit of a justification in every case, in which evidence could be procured to establish it, without notice to the plaintiffs of such defence; for if admissible, and the justification should be proved, the least effect that could reasonably be given to it, would be, to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof."(3)

But it would appear that where a witness was objected to, as interested, and in the course of proving his interest,

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(1) Vide *Bohun v. Gaylor*, 6 Cowen, 316.

(2) 10 Wendell, 377.

(3) Vide *Barnes*, 448.

the judge allowed evidence which was objected to by the party offering the witness, but admitted him, with the remark that he should leave his credibility to the jury, the verdict would not, for that reason, be disturbed.

In *Ackley v. Kellogg*,<sup>(1)</sup> the defendants were sued as common carriers. The plaintiff's first and most important witness, on the trial, was objected to by the defendants, as interested; and various witnesses examined to prove his interest, to whom several questions were allowed to be put, notwithstanding objections to them, as improper, by the plaintiffs. The judge admitted the witness, with the remark, that he should submit his credibility to the jury, who thereupon found a verdict for the defendants. And now a motion was made in behalf of the plaintiff for a new trial, upon several grounds, and among others, that improper questions were allowed to be put, touching the interest of the plaintiff's principal witness; and per *Sutherland, J.*, "It is said the judge admitted improper evidence, to establish the interest of Standish, the plaintiff's witness. But as he held the witness competent, the evidence, conceding that it was inadmissible, produced no effect, and as it was addressed exclusively to the court, affords no ground for granting a new trial. Nor can we regard the remark of the judge on closing the inquiry, that he should submit the credibility of the witness to the jury. Upon the case, therefore, the motion for a new trial must be denied."

Nor will a new trial be granted on a mere technical objection, such as, to the admission of a printed statute book in evidence, when it appears that the printed statute was correct, and an exemplification of it on a new trial, would be the same evidence.

*Duncan v. Dubois*.<sup>(2)</sup> Debt on bond. The plaintiff offered in evidence, an act of congress, from the printed

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(1) 8 Cowen, 223.

(2) 3 Johns. Cas. 125.

statute book, which was objected to, but admitted by the judge. A motion was made, on the part of the defendant, for a new trial, on the ground of the admission of improper testimony, and for the misdirection of the judge. *Per Curiam*—"The general rule undoubtedly is, that the printed statute book is not evidence of private acts, although there are instances in which the printed statute book has been admitted as evidence of a private act. But, without giving any definitive opinion on the admissibility of the statute book, it was shown on the argument for a new trial, that the printed book was correct, by a production of an exemplification of the private act. There would, therefore, be no use in a new trial on that ground, merely, because the evidence, on such new trial, would, in that respect, be precisely the same. This is a peculiar case, in which it would be of no use to the parties, now to discuss the technical objection." (1)

And when the objectionable testimony is such as cannot possibly mislead, or has been waived impliedly, by the party introducing it, the court will not for that cause disturb the verdict.

In *Norris v. Badger*. (2) Assumpsit against the defendants, as joint endoreers of a promissory note. Plea, the general issue, and a judgment confessed by the holder to the plaintiff and one of the defendants. At the trial, the plaintiff asked a witness if there were not incumbrances or liens, previous to the judgment confessed. The question was objected to as improper under the pleadings, or if admissible, that the facts inquired of could not be established by parol. The judge overruled the objection, and the witness was allowed to state large previous incumbrances by mortgage and judgment, and sales thereon. The plaintiff then offered to show regularly, by records,

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(1) Vide 2 Term Rep. 375.

(2) 6 Cowen, 449.



and executions, incumbrances having preference to the judgment and execution mentioned in the defendant's plea, sufficient to exhaust *Gumaer's* property. This was objected to as not admissible under the pleadings; but the proof was received, and the facts proposed to be shown, were fully established by exemplifications, executions, &c. Verdict for the plaintiff; and motion for a new trial, for this cause, among others, that parol proof of incumbrances was inadmissible, and the records ought to have been produced. But, per *Savage*, Ch. J.—“The judge erred in receiving parol evidence of the amount of incumbrances; and this would be cause for a new trial, had it not been immediately shown by proper documentary evidence, viz. exemplifications, &c. that the older liens on *Gumaer's* property, greatly exceeded its value. The parol evidence was unnecessary therefore. The verdict was fully sustained without it. Its admission might be error, had it been possible that the jury placed any reliance upon it, or could have been misled by it.(1) Going into the documental proof, was equivalent to a waiver of the parol evidence, which takes away the error. The motion for a new trial must, therefore, be denied.”

So, in *Preston v. Harvey*,(2) on appeal. The plaintiff in the court below, introduced secondary evidence of a survey, objected to by the defendant, but admitted by the court. The objectionable testimony, however, was afterwards supplied by primary evidence, consisting of the verdict of a jury, where the same point came up between the same parties, and in the same right. *Tucker*, J., delivering the opinion of the court, observes—“It is in general true, that if the court admit any improper evidence, upon a trial, which is made to appear by a bill of exceptions, there

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(1) 16 Johns. Rep. 92, and 3 Cowen, 621.

(2) 2 Hen. & Munf. 55.

must be a new trial. I was at first inclined to suppose, that the present case furnishes an exception, and probably the only exception, to the rule. For the error apparent from the first bill of exceptions was, I conceived, completely cured, by the matter contained in the second bill of exceptions; the evidence excepted to in both instances being adduced to prove *one and the same fact*, upon which fact the merits of the case entirely depended; viz—whether *Preston's* warrant was exhausted by prior entries. And although the court admitted improper evidence as to that fact at first, yet as further evidence, and that conclusive, between the parties, was also adduced to the same fact, I thought that it would be a vain thing to reverse the judgment for the first error, and to direct a new trial to be had, in which the verdict should be admitted as *conclusive* evidence of the fact in question, since the result, except as to costs, must be precisely the same, as if we should affirm the judgment.” And for this reason the court overruled the exception, and refused a new trial on that ground.

The principle, as to the admission of illegal testimony, has been recognised in Virginia, and, for the same reasons, as in the state of New-York.(1) In *Brown v. May*, (2) in trespass, for beating the plaintiff's slaves. Plea, not guilty. Verdict for plaintiff and appeal. The bill of exceptions stated, among other things, that on the trial the defendants offered, in mitigation of damages, the testimony of a witness, tending to prove that the plaintiff had given a general permission to Brown, one of the defendants, to visit his negro quarters, and to chastise any of his slaves, who might be found acting improperly. But the judge declared such testimony improper, on the plea of not guilty, although the beating by the defendant *Boisseau* was in the presence, and with the assent of the other de-

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(1) Vide ante, pp. 239, 240.

(2) 1 Munf. 288.

fendant Brown, since both defendants had joined in the same plea, and the beating had been committed by Boisseau, to whom it was admitted no such permission had been given. On the argument, the counsel of the appellants took the ground that the evidence was immaterial. But, per *Tucker, J.*—"I admit that it is an invariable rule, that every defence which cannot be specially pleaded, may be given in evidence upon the general issue at the trial. But I hold it to be a rule of law no less certain, that illegal or improper evidence, (however unimportant it may be to the cause,) ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them, and if it should have none, it is useless, and may at least produce perplexity."<sup>(1)</sup>

And upon the same principle, in Massachusetts, in *Walker v. Leighton*,<sup>(2)</sup> where in an action against two defendants in assumpsit, it was offered to prove, by way of offset, a demand of one of the defendants against the plaintiff, and overruled and excepted to. The court held that the evidence offered for the defendants was irrelevant and impertinent to the issue on trial, and evidence is as well to be rejected for its impertinence as for its incompetency.

But in the English common pleas, the rule appears to be somewhat different. There, it has been held that, although there may be exceptionable testimony, yet, if there be sufficient legal evidence without it, and justice has been done, the verdict will not be set aside.

In *Tullidge v. Wade*,<sup>(3)</sup> trespass for seduction of plaintiff's daughter. At the trial, the judge permitted evidence of promise of marriage to be given. Verdict for plaintiff, and a motion to set it aside for this cause, among others, that illegal testimony was admitted. And, per *Bathurst, J.*—

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(1) Et vide *Lec v. Tapscott*, 2 Wash. 276, and *State v. Allen*, 1 Hawks, 6.

(2) 11 Mass. Rep. 140.

(3) 3 Wils. 18.

“To be sure, the giving the promise of marriage, in evidence, at the trial of this cause, was very improper; but as the jury were cautioned not to take notice of it, I am inclined to think they did not, for if they had, I think they would have given more than £50 damages. In actions of this nature, and of assault, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room. I am of the same opinion with my lord chief justice, and my brothers.” The court unanimously refused the rule.

So, in *Horford v. Wilson*.<sup>(1)</sup> Action on a bill of exchange, verdict for plaintiff; and on motion for a new trial, for this cause among others, the admission of parol evidence to prove the contents of a letter, written to the defendant, for the purpose of informing him of the dishonour of the bill, although no notice had been received for the production of the original. *Mansfield*, Ch. J.—“I do not remember that any such objection was made upon the trial. Neither will the court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it, to authorize the finding of the jury.”

And, in *Doe v. Tyler*,<sup>(2)</sup> in ejectment. The question raised was, whether Lord Teynham was of sound mind when he suffered a recovery in 1789. There was conflicting evidence on the point; but in the opinion of the court and jury, the evidence in favour of his lordship's being of sound mind preponderated, and on that ground a verdict was found for the defendant. A great number of witnesses spoke to his lordship's competency to transact all ordinary business, and among other evidence to this effect, the accounts of a deceased steward were put in, which, it was

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(1) 1 Taunt. 12.

(2) 6 Bingham, 561.

assumed his lordship had examined and settled. These accounts were handed to the jury, and commented on by the counsel for the defendant, as being important to his case. *Jones*, sergeant, obtained a rule *nisi* for a new trial, on the ground, among other objections, that those accounts had been improperly received in evidence. The court, upon hearing the report of the trial read, stopped *Wilde*, sergeant, who was to have shown cause, and called on *Jones*, to show that there was not enough to sustain the verdict, independently of the evidence objected to, who contended that it was impossible for the court to discriminate between the effects produced by each parcel of evidence on the mind of the jury, or to determine that the verdict was not altogether occasioned by the very evidence now objected to. *Tindal*, Ch. J.—“This rule must be discharged. I will assume, for the purpose of this discussion, though I give no opinion on the point, as we have not heard the other side, that the evidence in question ought not to have been received. But the court will not close their eyes to the rest of the evidence; and, if they see that there is enough, not merely to make the scales hang even, but greatly to preponderate in favour of the defendant, they will not send the cause to a jury again. It has been contended that we are to analyze the evidence by a difficult process, and to discriminate the precise effect produced on the mind of the jury on each portion of the proof; but we have a much plainer course; and, that is, to hear the report of the trial, and to sustain the verdict if we all are satisfied that there is enough to warrant the finding of the jury, independently of the evidence objected to. On this principle the decisions in *Horford v. Wilson*, and *Nathan v. Buckley*,<sup>(1)</sup> are quite in point; and we cannot send the cause to a new trial, when the jury are

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(1) 1 Taunt. 12, and 2 Moore, 153.

right upon that portion of the evidence which is unimpeached."

So, in *Massachusetts*, a similar distinction has been taken. In *Prince v. Shepherd*,<sup>(1)</sup> it was held, that where a point in a cause is clearly proved by competent evidence, and found by the jury, a new trial will not be granted, because of the incidental admission of improper, and not very important, evidence tending to prove the same point. Action in assumpsit. Upon the trial, one Prince testified, through inadvertance, to certain declarations of the plaintiff, at other times than those inquired of by the defendants, and, upon a motion for a new trial, this point was taken. And, by *Parker*, Ch. J., delivering the opinion of the court.—"In regard to the testimony of Prince, relative to the declarations of the plaintiff, this seems to have fallen from the witness incidentally, without any fault of the plaintiff or his counsel, and it was considered in the order in which it was introduced, as a part of the *res gestæ*; as a complaint made to an attorney in the course of business. This may admit of doubt; but if the evidence was not strictly competent, still it was not material, and could have no improper influence with the jury. For the plaintiff's proof of his debt, to a certain amount, is perfectly satisfactory, and a verdict ought not to be set aside for a slight slip, when the verdict is clearly right."

The same result will follow, if, on application, it should appear that the testimony objected to, operated favourably to the party seeking to disturb the verdict. As in *Smith v. Harmanson*.<sup>(2)</sup> Leave had been given at the trial, to submit special matter in evidence to the jury, from which they had inferred, that they might render an aggregate verdict of principal and interest, on a bond for which the suit was brought. It was favourable to the defendant below;

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(1) 9 Pick. 176.

(2) 1 Wash. Rep. 6.

yet the defendant had it reversed in the district court, from which the plaintiff, in his turn, appealed. The court of appeals reversed the judgment of the district court, and affirmed the judgment below, although it was admitted, improper testimony had been offered to the jury, by the defendant below, but being for his benefit, they would not, for that reason, disturb it.

The principle of the above cases has not been recognised in the state of New-York, in express terms; although from the language of the court, in *The Supervisors of Chenango, v. Birdsall*,<sup>(1)</sup> it might be inferred. In that case Randall, one of the sureties of the treasurer, and a *co-defendant*, was called as a witness on the part of the plaintiffs. The other defendants objected to his being sworn as a witness, but the objection was overruled. In the progress of the trial, the same facts testified to by him were testified to by other witnesses, or appeared by the admissions of the defendants. A motion was made by the defendants for a new trial, on the ground of his admission. *Marcy, J.*, delivering the opinion of the court on this point, observes—"It is contended by the plaintiffs, that if Randall was improperly admitted as a witness, a new trial ought not to be granted; because the facts to which he testified were abundantly made out by other evidence in the cause." And in the sequel of his opinion, the learned judge seems to admit the force of this argument, by proceeding to show that the facts proved by Randall were in some respects material, and *confined to his statement*. And upon that ground, he being an incompetent witness, a new trial was awarded. But however strong the inference from the ground taken in this case might be, it would go to show merely that the rule was not fully settled, but would not overrule the express adjudication of the court in *Mar-*

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(1) 4 Wendell, 453.

*quand v. Webb*, and of *Osgood v. The Manhattan Company*.<sup>(1)</sup>

But in a recent case, *Stiles v. Tilford*,<sup>(2)</sup> the court seems to have adopted the principle, with little, if any, perceptible distinction, unless the one alluded to by the court, that the class of cases to which it belongs are of an anomalous character, and not reducible to the strictness of ordinary rules. It was a case of seduction. The evidence of expenses incurred, subsequent to the commencement of the suit, was received by the judge, though objected to by the defendant. The jury found a verdict for the plaintiff, for \$800 damages. The defendant made a case, and also tendered a bill of exceptions, and moved for a new trial. And, per *Sutherland, J.*, delivering the opinion of the court.—“The cause of action was abundantly made out, independently of the testimony objected to. The daughter says expressly that she returned to her father’s house, because she was incapable of working as usual, and that after her return, she was unable to earn her subsistence as formerly. Here is express loss of service, and all this was before she arrived at the age of twenty-one. The testimony objected to was merely in aggravation of damages.—The action is altogether anomalous in its character, and the ordinary rules of evidence cannot, in all their strictness, be applied to it, without defeating its essential object. No separate action could ever be maintained for the expenses and loss of service, incurred after the commencement of this suit; the objection therefore does not lie, that the defendant may be made to pay twice for the same damages. According to the strict rules of evidence, perhaps the testimony objected to was inadmissible; but I am inclined to think, we should be justified in saying, that from the nature of the action, it is to be intended that the evidence had little or

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(1) *Supra*, p. 239.

(2) 10 Wendell, 338.



no influence on the verdict of the jury; and that a new trial ought not therefore to be granted."

2. If the judge, at the trial, exclude legal testimony on the matter in issue, the verdict will be set aside, and a new trial granted.

Thus, in *Bignall v. Devnish*,<sup>(1)</sup> it was held that it is a good cause of new trial, where the judge who tried the cause, has denied to admit that for evidence which was legal evidence.

In *Gravenor v. Woodhouse, Thomas and wife*,<sup>(2)</sup> Action in replevin, and avowries, first by W. and T. for rent due to W. and T. from plaintiff, as tenant to W. and T.: secondly, by W. and T. and his wife, in right of his wife, for rent due to W. and T. and his wife, in right of his wife, from plaintiff, as tenant to W. and T. and his wife, in right of his wife, were holden to be supported by evidence of an attornment from plaintiff to W. and T. and his wife. The avowants proved an attornment made by the plaintiff, after ejectment brought against him seven years before the commencement of the replevin suit, during which seven years it did not appear that rent had been demanded. The plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed, and certain letters from that person containing expressions adverse to the avowant's claim; which evidence having been rejected, on the ground that the plaintiff could not be permitted to dispute his tenancy after an attornment, the court granted a new trial.

In *Freeman v. Arkell*,<sup>(3)</sup> an action for maliciously, and without probable cause, charging the plaintiff with an assault, before a magistrate. The magistrate proved, that

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(1) 6 Mod. 242.

(2) 1 Bingham, 38.

(3) 2 Barn. & Cress. 494.

the depositions taken before him were reduced to writing, and that he delivered them at the court of quarter sessions to the clerk of the peace, or his deputy. The clerk of the peace stated, that a bill of indictment for the assault was preferred, and that the grand jury returned *ignoramus*, and that it was usual in such case to throw away, or destroy the depositions, and that he had searched among his papers and could not find them. The judge ruled out the depositions, thinking their loss not sufficiently proved, as they had been traced to the deputy of the magistrate's clerk. *Bayley, J.*, the other judges concurring, was of opinion, that in this case the plaintiff did enough to let in the secondary evidence, and that under these circumstances, there ought to be a new trial.

In New-York, a judgment will be reversed, or a verdict set aside and a new trial granted, if competent testimony be excluded.

In *Gurnee v. Dessies*,<sup>(1)</sup> on the return to the *certiorari*, the only error assigned was, that the justice had refused to admit the evidence of a free black man, as to facts which took place while he was a slave. The cause was submitted without argument. *Per Curiam*.—"A free black man is a competent witness to prove facts which may have happened while he was a slave. The judgment below must be reversed."

So, in *Hewlett v. Cock*,<sup>(2)</sup> in ejectment. The plaintiff offered to read in evidence, a lease more than thirty years old, purporting to bear date in 1722, granting to the lessee, a right to flow lands for the use of a mill, which was found among the title papers of the estate of the lessor, in 1779; and the owner of the mill, in 1810, recognised the right of the land overflowed, in the person to whom the estate of the lessor had been transmitted. The judge refused to permit the lease to be read, until he should prove a posses-

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(1) 1 Johns. Rep. 508.

(2) 7 Wendell, 371.

sion under it, and for defect of proof, directed a nonsuit. On motion to set aside the nonsuit, and for a new trial, after commenting upon the case at large, *Nelson, J.*, delivering the opinion of the court, concludes—"A new trial must be granted for the reasons that the judge ought to have admitted the lease in evidence, without proof of the execution of the same, on the ground of its being an ancient deed. Its great antiquity, the account given of it, together with the evidence of a corresponding possession, and the other circumstances, were sufficient to authorize its admission."

In Massachusetts, the court have carried the rule to the granting of a new trial, where evidence has been rejected by the judge, which was proper to have been received under *one count* of the declaration; although such count was not relied on, nor read by the plaintiff at the trial, a general verdict having been given for the plaintiff on all the counts. Thus, in *Middlesex Canal Corporation v. M'Gregore*.<sup>(1)</sup> Case on promises to pay toll, and on two promissory notes. The defendant, at the trial, rested his defence altogether upon the insufficiency of the canal, and offered to prove that, in consequence of an advertisement by the agent of the canal, that it was sufficient for the transportation of lumber, he was induced to enter his rafts in the canal, and gave the notes to secure the toll, when the same should have passed through; and that the canal proved altogether insufficient. The evidence was rejected, and a general verdict for the plaintiff, subject to the opinion of the court, upon the right of the defendant to prove the facts stated as above. If the court should be of opinion, that the evidence was improperly rejected, the verdict to be set aside, and a new trial granted; otherwise, judgment to be rendered according to the verdict. *Per*

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(1) 3 Mass. Rep. 124.

*Curiam*.—"If there is any one count on which the defendant's evidence, which was rejected, would have been proper, the verdict must be set aside. The first count is *indebitatus assumpsit* for toll, for the transportation of a certain quantity of lumber through the canal. On this count it was necessary for the plaintiffs to prove the quantity of lumber, for the transportation of which, they were entitled to demand toll; and it was clearly competent for the defendant to prove, how much lumber he in fact transported, for which he was liable to pay toll. To prove this fact, the evidence which he offered, and which was not admitted, was legal and proper. The verdict, therefore must be set aside, and a new trial granted."<sup>(1)</sup>

But a new trial will not be granted for the rejection of a witness on a supposed ground of incompetency, when another witness establishes the same fact, and it is not disputed by the other side.

In *Edwards v. Evans*,<sup>(2)</sup> an action for bribery, and verdict for defendant. A new trial was moved for, because one Bradley was rejected as a witness, on the ground of interest, a similar suit having been commenced against him. It was admitted, the fact, he was called to prove, had been proved by another witness. The opinion of *Le Blanc, J.*, will best illustrate the rule. "The ground on which new trials are granted, on account of the rejection of a witness who was prepared to give evidence relative to the issue, is, that the court cannot weigh the degree of relevancy, or say what effect any fact that is relevant would have had on the minds of the jury. But where the objection merely is, that what was proved by one witness could have been proved by two; there being no denial of the fact which he was called to prove, on the part of the defendant, but the defendant going to the jury on a defence alto-

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(1) Et vide, 5 Mass. Rep. 391.

(2) 3 East, 451.

gether collateral to that fact, there is no ground for the court to interfere by granting a new trial."

So, in *The King v. Teal and others*,<sup>(1)</sup> Indictment for conspiracy. A witness, called to prove it, swore she had formerly sworn false, at the instigation of the defendant Teal, charging her bastard child to the prosecutor. To discredit her, she was cross-examined to her own profligacy, and answered as to her criminal connexion with several. The defendant, further to discredit her, offered to prove her guilty with others. The proof was rejected, and made a point on a motion to set aside the verdict. Upon this, Lord *Ellenborough*, Ch. J., observes: "The other objection amounted to no more than this, that *Hannah Stringer*, the witness, having admitted that she had been connected with two or three persons, the learned judge thought it immaterial to examine witnesses tendered on the part of the defendant, to show that she had been also connected, at other times, with several other persons; considering, that, by her own showing, she was a common woman. But it was now urged, that the extent of her prostitution might have shaken her credit in a greater degree. If, however, the evidence had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict." The rule was therefore discharged.

Nor will the verdict be set aside for the rejection of legal testimony under a bad plea.

In *Meyer v. McLean*,<sup>(2)</sup> an action of debt, the defendant pleaded *nil debet*, and subjoined a written notice, that the defendant would give in evidence under that plea, that an execution had been issued on the judgment, which had been duly levied and paid to the sheriff. On the trial, after the record had been produced by the plaintiff, the de-

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(1) 11 East, 307.

(2) 1 Johns. Rep. 509.

defendant offered the special matter mentioned in the notice to his plea in evidence, which was objected to by the plaintiff. This point being reserved, the jury on the evidence found a verdict for the defendant. A motion was now made to set aside the verdict and for a new trial. *Per Curiam*—"By going to trial on the plea and notice, the plaintiff admitted the plea to be valid as a general issue. The judge at *nisi prius* is not to decide on the pleadings; and he was right in admitting the evidence. This is an application for a new trial; but why should we award a new trial if the plea be bad? A new trial is never granted for a defect in the pleadings. The plaintiff should have sought a different remedy."

Nor where inadmissible evidence was properly rejected, but upon incorrect grounds. As in *lessee of Ludlow's heirs v. Parke*.<sup>(1)</sup> The defendant offered in evidence an order, made by a court of common pleas, which was rejected for various reasons; and among others, that the defendant, by a recital in a certain deed, must be precluded from giving in evidence any other order than of a certain date. The counsel for the defendant, contended that the case was reserved, not so much for the purpose of determining whether this evidence was properly rejected, as for the purpose of determining whether the opinion thus expressed is consistent with law; and insisted that if it is not, a new trial should be granted. But *Per Curiam*—"In the trial of a cause, a particular item of evidence is offered and objected to for a variety of reasons, one or more of which are sufficient to show that the evidence is improper. The court, in assigning reasons for the rejection of the testimony, express an opinion upon some one point which cannot be sustained upon legal principles. It is unreasonable, it is contrary to every day's experience to suppose,

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(1) 4 Ham. Ohio Rep. 39.

that upon a motion for a new trial, the court will confine themselves to the consideration of the opinion thus expressed. The only proper inquiry in such case is, was the evidence properly rejected, and that, without regard to the particular reasons assigned by the court, when it was rejected. Any other course would lead to manifest injustice. It would be trifling with the rights of the parties.”(1)

Nor will a new trial be granted where the judge has a discretion to receive or reject evidence; as where the plaintiff has rested, or the testimony is closed on both sides; as in *Edwards v. Sherratt*.(2) Action against the defendant as a common carrier. The plaintiff's counsel having closed their case, and the counsel for the defendant having begun to address the jury, the learned judge, whose opinion was in favour of the defendant, stopped him by stating that impression, and that in his opinion, the principal question for the jury to decide was, *whether the bags were put on board, according to the usual course of dealing with a common carrier*. The plaintiff's counsel then for the first time stated, that the defendant had received some money, which the mob had paid for the corn seized by them, and which it was contended that the plaintiffs were entitled to recover on the money counts. The learned judge, however, was of opinion, that as the plaintiffs had come there to try the question how far the defendant was liable as a common carrier, and that this was only an after thought to carry a verdict and the costs, the evidence ought not to be admitted in that stage of the cause. A rule *nisi* was obtained. The rejection of the testimony was sustained by all the judges; *Le Blanc*, J., observing—“A question has been made, whether the judge did right, after a trial on the main question, and the plaintiffs had closed their case, to refuse to let them into additional evidence

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(1) Et vide, Charlton's Georg. Rep. 227.

(2) 1 East, 604.

upon a collateral point, which the parties did not come to try, and which was only thought of when the plaintiffs found that the judge's opinion was against them on the main point. I have always conceived that it is a matter of discretion in the judge, after the plaintiff has closed his case, and the defendant's counsel has begun his address to the jury, to permit the former to go into a new case. And I see no ground to complain of the exercise of that discretion, in the present instance."

So, in *Alexander v. Byron*.<sup>(1)</sup> The defendant moved for a new trial, on the ground of a refusal by the court to permit a witness, offered by the defendant, to be examined. The witness appeared in court in the afternoon of the same day, after the testimony on both sides had closed, and the counsel for the defendant declared they had done with the examination of witnesses, and had proceeded in summing up the cause; and was then offered by the defendant. The plaintiff objected to his admission in that stage of the cause, and because his witnesses had left the court. The witness was refused by the judge. *Kent, J.*—"The question is simply, whether it was the duty of the judge, under the circumstances of the case, to have received the witness at the time he was offered. It can never be claimed by either party, as a matter of strict right, to open the cause to proof, after full opportunity has been given to each side to be heard, and the testimony has been regularly, and by mutual consent closed. It was therefore properly admitted upon the argument of this motion, that the subsequent admission of testimony must rest upon the discretion of the court, duly exercised, according to the circumstances of the case.—I cannot say in the present case, that the judge has not exercised a due discretion; and am of opinion the motion ought to be denied." And by the whole court, motion denied.

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(1) 2 Johns. Cas. 318.



But in *Mercer v. Sayre*,<sup>(1)</sup> the court granted a new trial on the ground that the judge had not exercised his discretion soundly, in rejecting testimony. After the evidence had closed, and the defendant's counsel had summed up, and while the plaintiff's counsel were addressing the jury, the counsel for the defendant informed the judge, that he had just discovered, from the inspection of a paper in the possession of one of the plaintiff's witnesses who had been examined, evidence material to the defendant; and asked permission to give evidence of that fact to the jury; but the judge thought he could not admit the evidence, unless the plaintiff's counsel would consent; which being refused, the evidence was rejected, and the jury found a verdict for the plaintiff. *Per Curiam*.—"The evidence offered was material, inasmuch as it went to destroy any presumption that the money was actually received by the defendant at the time the action was brought. The judge, under the circumstances of the case, had a discretion to admit the evidence; and it ought in sound discretion to have been received. We think therefore that the defendants are entitled to a new trial."<sup>(2)</sup>

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(1) 7 Johns. Rep. 306.

(2) Vide, 7 Greenl. 181.

## CHAPTER IX.

### NEW TRIALS, FOR MISDIRECTION OF THE JUDGE.

IN the distribution of the merits of a cause, at the trial, the jury are to respond to the truth of the facts, and the judge to the law. However distinct their provinces may be, they unite in one result, the verdict. To accomplish this, the judge, after the testimony closes, has an important, and in some instances a difficult duty to discharge. The facts for and against are to be recapitulated and grouped, and the principles of law applied. To be able to do this on every occasion, whatever the nature or intricacy of the case may be, requires a comprehensive knowledge of law, great powers of discrimination, close attention, and much tact and skill—a degree of judicial excellence, rather to be desired than realized in perfection. It is scarcely possible that the most enlarged and experienced mind should, in every instance, be able to lay down the principles of law, with that precision, that can bid defiance to the astuteness of counsel, against whose client the principle is intended to apply. Nor is it unfrequently the case, that from some obliquity of intellect, or misapprehension of fact, or indistinct perception of the precise point of law, in the judge, the minds of the jury are carried to illegal results, and justice is defeated. When the merits of the case suffer from an ignorant, confused, or perverse application of the law, courts never fail to interpose. Where, on any other grounds, by reason of the unimportant nature of the cause, or the trifling injury resulting to the party, the courts would not interfere, they will on the ground of misdirection. So uni-

versal is the practice, and with such deep reverence are the principles of law regarded, that perhaps there cannot be found one instance of injustice done, in a clearly ascertained case of misdirection, where a new trial has not been directed. It is a favourite ground of relief, has the ear of the court, is treated with marked respect, has every facility afforded, and when successful, the relief is uniformly granted without costs.

The error of the judge calls for correction as a matter of right, not of discretion, and a motion for a new trial on this ground is an appeal to the well settled principles of law. Hence the various modes of relief, branching out into almost endless distinctions, giving to this head of practice a profusion of illustration.

1. If the judge at the trial misdirect the jury on matters of law, material to the issue, whatever may be the nature of the case, the verdict will be set aside, and a new trial granted.

Thus in an *Anonymous* case,(1) the court say, it is good cause of new trial, where the judge who tried the cause has denied to admit that for evidence, which was legal evidence, or where he *misdirects* the jury. Again, new trials shall be granted, if the judge at *nisi prius* misdirect the jury ; because those trials are subject to the inspection of court.(2)

The error of the judge in his charge to a jury in a matter of law, is well illustrated by *How v. Strode*,(3) where the jury had given them in charge, as the principal point on which they were to pass, a fact admitted by the pleadings. It was a case in replevin, for taking cattle. The defendant avowed taking them damage feasant. Plea in bar, common of pasture ; replication, a custom to inclose ; rejoinder *de injuria sua propria*, and joinder *inde*. Upon

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(1) 6 Mod. 242.

(2) 2 Salk. 649.

(3) 2 Wils. 269.

the evidence, the judge was of opinion, and so charged the jury, that he thought the defendant had not proved the custom entirely, and that if they believed the land in question was discharged and free from any person having a right of common thereon, they should find for the defendant; if not, that they should find for the plaintiff. The jury gave a verdict for the plaintiff, and it was moved for a new trial, for the misdirection of the judge; for that the right of common before inclosure made, was for cattle *levant* and *couchant*, upon each person's uninclosed lands; and this matter is not at all in issue, but is admitted on the pleadings by both sides. Of this opinion was the whole court, saying that the parties agreed by the pleadings, that while the lands in these open fields are uninclosed, all have a right of common for cattle, *levant* and *couchant*. And *per totam Curiam*.—"The verdict must be set aside for misdirection of the judge."(1)

It is essential to the success of the motion for a new trial on the ground of misdirection, that it should materially affect the verdict.(2) When this is the case, the rule becomes of universal application, embracing all kinds of actions, whether of *tort* or of *contract*. Even actions, penal in their nature and form, are not excluded, although the *defendant* may have a verdict.

In *Wilson v. Rastall*,(3) an action strictly penal. It was brought to recover penalties for bribing voters at an election. At the trial, one *Handley*, an attorney, was sworn a witness, who refused to produce certain papers, or to answer as to their contents, having come to the possession of the papers, as the attorney of one *W. Handley*, alleged to have been one of the agents of the defendant in com-

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(1) Vide as to *Misdirection*, generally, 6 Com. Dig. 223, Day's edit. 2 Tidd, 915. Gra. Prac. 514.

(2) Vide 10 Johns. Rep. 447. 5 Day, 479. 5 Mass. Rep. 487.

(3) 4 Term Rep. 753.

mitting the offence. The judge sustained the objection, and the jury found a verdict for the defendant. A rule *nisi* was granted to show cause why there should not be a new trial, on the ground of mistake in the judge, in considering that Handley was bound, by his character of attorney, to withhold the letters required to be produced in evidence. But a doubt being started, whether there was any instance of a new trial having been granted, where the verdict had passed *for the defendant in a penal action*, the court desired that point might be looked into. After an elaborate argument, the judges severally delivered their opinions, at once illustrative of the whole compass of a judge's duty and discretion, presiding at *nisi prius*, and the length to which the court will go to correct a verdict, occasioned by his misdirection. The opinion of *Lord Kenyon*, with whom the other judges concurred, is deserving of particular notice on this subject. "Though this motion for a new trial is an application to the discretion of the court, it must be remembered that the discretion to be exercised on such an occasion, is not a wild, but a sound discretion, and to be confined within those limits, within which an honest man, competent to discharge the duties of his office, ought to confine himself. And that discretion will be best exercised, by not deviating from the rules laid down by our predecessors; for the practice of the court forms the law of the court. It has been said, however, that if we grant a new trial in this case, we shall innovate on the practice of those who have gone before us, but that was more easily asserted than proved; for there is not a *single instance*, where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion upon the whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion.—But wherever a mistake of the judge has crept in, and swayed

the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial.”(1)

So, in *Calcraft v. Gibbs*.(2) Action of debt, for a penalty under the game laws. On a second trial, the plaintiff having been nonsuited in the first, the judge charged the jury, that if they were satisfied that the defendant acted *bona fide* as one Roebuck’s game keeper, who claimed title, and under his direction, and ignorant of the nature and extent of his claim to sport over the manor in question, they should find a verdict for him, on the ground that this was not a proper form of action for trying disputed claims. On this, the jury found for the defendant. A rule *nisi* was obtained on account of a misdirection in point of law, as to the title to the manor where the offence was alleged to have been committed. It was again held, after argument, that for misdirection, without regard to the nature of the cause, a new trial would be granted. Lord *Kenyon*, Ch. J.—“If this case had been properly left to the jury, and they had even drawn a wrong conclusion, we should not have been disposed to grant a new trial in such an action as the present. But where there is any ground of objection to the law delivered by the judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is. The application for a new trial is a direct appeal to the justice and laws of the country, and cannot be tried and disposed of by any other rule.” To show how strongly marked the line of discrimination is, as to the misdirection of the jury, and its decisive effect upon motions for new trials, compared with other causes, the court afterwards say, in *Brooke qui tam v. Middleton*, that they considered themselves precluded

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(1) Vide, 4 Conn. Rep. 366, and 3 Cranch, 298.

(2) 5 Term. Rep. 19.

from granting a new trial in penal actions, except for a *misdirection of the judge*.”(1)

The rule is still more applicable to cases in the nature of *tort*, where so much must necessarily be left to the discretion of the jury. A misdirection here, cannot but operate unjustly. One or two recent cases will furnish an illustration.

*Crofts v. Waterhouse*.(2) Action for negligence. The driver of a stage coach gathered a bank, and upset the coach. He had passed the spot where the accident happened, twelve hours before, but in the interval, a landmark had been removed. In an action for an injury sustained by this accident, the judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the action having been occasioned by his deviation, the plaintiff was entitled to a verdict. A verdict was found for the plaintiff, £150 damages. A new trial was moved for on the ground of a misdirection, for that it ought to have been left to the jury to ascertain whether the deviation had been occasioned by negligence, or by unavoidable accident. And per *Best, Ch. J.*—“The coachman was bound to keep in the road, if he could; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption, have found a verdict for the plaintiff. But the learned judge, instead of leaving it to the jury to find whether there was any negligence, told them that the coachman having gone out of the road, the plaintiff was entitled to a verdict. This action cannot be maintained unless negligence be proved; and whether it be proved or not, is for the determination of the jury, to whom, in this case, it was not submitted.” The court were unanimous in directing a new trial.

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(1) 1 Camp. 445, et vide, 2 Str. 899, and 1238, and 3 Johns. Rep. 180.

(2) 3 Bingham, 319.

And in *Young v. Spencer*.<sup>(1)</sup> Case by the owner of a house against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises. Plea, not guilty. The jury found that the lessee did open the door without leave; but that the house was not in any respect weakened, or injured by it. The learned judge, thereupon, directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case. The case being argued, Lord *Tenterden*, Ch. J., after stating the facts of the case, now delivered the judgment of the court.—“ We cannot take upon ourselves to say that there was not any injury to the plaintiff’s reversionary right. It might have been left to the jury to say whether there was or was not an injury to the right. The old authorities upon this subject, are not reconcilable with each other. It seems to be clearly established, however, that if any thing be done to destroy the evidence of title, an action is maintainable by the reversioner. We cannot say that the opening of the door in this case, affects the evidence of the plaintiff’s title. That is a question of fact. All that we can do is to grant a new trial, in order that the question may be submitted to the consideration of the jury.”

But it is to actions arising *ex contractu*, the rule emphatically applies, acknowledging no exception or restriction, unless where the matter in controversy is too trifling to bear protracted litigation, or the court incline to sacrifice a technical objection, to substantial justice. Thus,

In *Holliday v. Atkinson*,<sup>(2)</sup> where a promissory note, expressed to be for value received, was made in favor of an infant, aged nine years, and in an action upon the note, by the payee, against the executors of the maker, no evidence of consideration being given, the learned judge told

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(1) 10 Barn. & Cres. 145.

(2) 5 Barn. & Cres. 501.



the jury, that the note being for value received, imported that a good consideration existed, and that gratitude to the infant's father, or affection to the child, would suffice. There was a verdict for the plaintiff, and a rule *nisi* obtained. And on motion, per *Abbot*, Ch. J.—“I think that this case must be sent to a new trial. I agree that where a note is expressed to be for value received, that raises a presumption of a legal consideration, sufficient to sustain the promise ; but that is a presumption only, and may be rebutted. Now we find that this note was given to a boy only nine years old, whose father was living, and that the donor was in a state of imbecility, and not far from his death. It then became a question for the jury, whether the note was given upon any legal consideration, and I think that the direction given to them as to the sufficiency of gratitude to the father, or affection to the son, was improper.”

The rule, and to the same extent at least, has been adopted in Massachusetts. In their practice, a slight misdirection will avoid the verdict ; as in *Boyden v. Moore*.<sup>(1)</sup> Assumpsit on certain promissory notes. Money was paid into court, and taken out, but not in satisfaction, and the suit went on. Upon a report of the case by the judge, it appeared he had found, by his calculation, there would be due to the plaintiff fourteen cents and four mills, if the defence were just, and the evidence in support of it believed ; and he charged the jury therefore, that if upon calculation they should find, that the money brought into court did not fully pay every cent which was due, yet if they were satisfied that the defence set up by the defendant was just, although a small balance was still due, if that balance appeared to them a mere trifle, their verdict ought to be for the defendant. On motion for a new trial, upon this point of misdi—

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(1) 5 Mass. Rep. 365.

rection, *Parsons*, Ch. J., who delivered the opinion of the court, after recapitulating the charge of the judge, proceeds—"When the mistake arises from the misdirection of the judge on a point of law, the court ought, in all such cases, to relieve the party suffering by it, although he may be indiscreet in making his motion. The law is our only criterion of right and wrong in the decision of causes, and if it be mistaken by the court, whose duty it is to declare the law, the consequences of the error may be extensive, reaching beyond the action in which it was committed; and it may affect other legal principles. We have looked with some attention into books, to find some case where, in a misdirection of the judge, the court have declined to interfere, by setting aside the verdict found in consequence of the misdirection. We have not been able to find a single case."

With this agrees *Dudley v. Sumner*,<sup>(1)</sup> argued afterwards in the same court. The principles contended for in that case were such as to call forth the most elaborate discussion; and the opinion of the court, granting a new trial, was finally put upon the misdirection of the judge.

In New-York, the rule has been so fully recognised as to prevail where a misdirection might have affected the verdict, and the chances were equal that it produced such effect, as in *Wardell v. Hughes and Moore*.<sup>(2)</sup> This was an action on a joint promissory note, by the defendants, "payable and negotiable at the Bank of Ontario, in Canandaigua." The judge charged the jury, that, by the terms of the note, its negotiability was restricted to the place where it was made payable; and that if they should be of opinion, that the note was applied by Hughes to the payment of an individual debt, without the assent of Moore, his partner, the plaintiffs were not entitled to recover. The

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(1) 5 Mass. Rep. 438.

(2) 3 Wendell, 418.

jury found for the defendants. A motion was made to set aside the verdict, and it was contended, the note was restricted in its operation. But, per *Marcy*, J., delivering the opinion of the court, "I think the judge erred in telling the jury, that, by the terms of the note, its negotiability was restricted to the place where it was made payable. The jury found a verdict for the defendants; whether on the ground that the note had been negotiated at a place different from that contained in the body of the note, or on the ground, that it had been passed by Hughes, for his individual debt, and that the assent of Moore had not been shown, it is impossible for us to determine. If the verdict was found on the first ground, it ought to be set aside, for the misdirection of the judge; if on the latter, the evidence being of such a character that it might be regarded as insufficient to show the assent of Moore, it should not be disturbed. Inasmuch, therefore, as the verdict may have resulted from the error of the judge, and I think there is an even chance that it did, a new trial ought to be granted."

According to this decision, even a reasonable doubt as to the effect of the erroneous charge, will be sufficient to avoid the verdict. In a prior case, *Clarke v. Dutcher*,<sup>(1)</sup> the court had shown with what astuteness they seize upon errors of law, that creep in at the trial. It was conceded, in that case, that a charge of the judge, entirely abstract or out of the case, so as not to affect it, though erroneous, cannot be insisted on as error by exception; but, it was added, the court, in error, will look through the case, and if they find that it might have been affected by the charge or opinion, injuriously to the plaintiff in error, the judgment will be reversed. This was an action in assumpsit for over payment by mistake, and verdict for plaintiff. The charge of the judge below, which was excepted

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(1) 9 Cowen, 674.

to, referred to a subsequent promise, taking the case out of the statute of limitations, and consisted in the common error of confounding law and fact, and not sufficiently discriminating the province of the court and jury. It was noticed and corrected, by granting a new trial, and is illustrative of the rule. *Sutherland, J.*, delivering the opinion of the court, observes, "Where there is any dispute as to the facts which go to prove the making of a new promise, there, whether a sufficient acknowledgment or promise has been made to take the case out of the statute, is a mixed question of law and fact, to be passed upon by the jury. But when the facts are undisputed, it is for the court to determine, whether they take the case out of the statute or not. Here it was not denied, that Clarke made the declaration relied upon as evidence of an acknowledgment of the debt. Whether it amounted to a sufficient acknowledgment or not, was an unmixed question of law. The opinion expressed by the court was erroneous, and properly excepted to." Again, "It is undoubtedly true, that a judgment will not be reversed on account of an erroneous opinion expressed or decision made by the court, where it clearly appears, that the error did not and could not have affected the verdict or the judgment. But this very position implies that we are to look beyond the letter of the exception, into the case itself, to ascertain what the effect of the error was."

2. With a like scrupulous attention to the rules of law that ought to govern the charge, it has been held to be erroneous in a judge to instruct a jury, that they may indulge a presumption, not warranted by the evidence disclosed.

As in *Harris v. Wilson*.<sup>(1)</sup> Action in assumpsit, on a joint and several promissory note. Plea, general issue, and that the note had been made by the defendant and one

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(1) 1 Wendell, 511.

Judd, and that the claim had been settled by arbitration. At the trial, the defendant's counsel insisted that the award was a bar to the plaintiff's right of recovery on the note. The judge decided, that in the absence of all proof as to what the note was given for, the award was not broad enough to cover it, but that the defendant's counsel might go to the jury upon the question of a *presumption* of payment, previous to the award, under the circumstances of the case, and to that effect charged the jury, who found for the defendant. A motion was made to set aside the verdict. And per *Sutherland, J.*—"I think the judge erred in submitting it to the jury, to determine upon the evidence before them, whether the note had not been paid or satisfied, by some arrangement between the parties previous to the arbitration. There was no evidence from which any such conclusion could legitimately be drawn. The defendant did not pretend that the note had been paid or satisfied in any other manner, than by the general settlement of the partnership concerns by the arbitrators. He did not attempt to prove any fact or circumstance from which such payment could be inferred."(1)

And in *Hollister v. Johnson*,(2) action for false imprisonment, against a constable, who had taken plaintiff's body in execution. The judge charged the jury, among other things, that the fact of the plaintiff's having property was not conclusive evidence that the execution might be satisfied, for it appeared that the premises were leased, and it might reasonably be presumed that the landlord had a claim for rent, which might have defeated the execution; and that if the defendant had not taken the body of the plaintiff, and it had turned out that he had not sufficient property to satisfy the execution, the defendant would have

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(1) Vide, 10 Wendell, 461.

(2) 4 Wendell, 639.

been liable. The plaintiff excepted to the charge, and the jury found a verdict for the defendant. The court, per *Sutherland, J.*, "The charge of the judge appears to me to have been wrong in two essential particulars:—in stating to the jury, that it might reasonably be presumed, that the landlord of the plaintiff had a claim or lien on the property, which was shown to have been in his possession, for rent, which might have defeated the execution.—Now there is not a particle of evidence in the case upon the subject of rent, except the simple fact, that the plaintiff lived on a farm, for which he was to pay or had paid \$60 per annum. No claim on the part of the landlord was shown, nor any other circumstance from which an inference could be drawn, that there was any rent in arrear; and unless such presumption exists in judgment of law in all cases between landlord and tenant, there was no foundation for it in this." And new trial granted for this cause.

So, in *Levingsworth ad. Fox*.<sup>(1)</sup> This was an action of trespass, to try titles to land on Savannah river, in which the jury took upon them to find, that a release produced and given in evidence by defendant, was fraudulent, without any proof of its being so, or of any circumstances from which it could be strongly inferred. Upon this ground the court, after argument, ordered a new trial, as fraud is never to be presumed, unless the circumstances are so strong as to leave no doubt to the contrary. From the silence of the reporter in this case, the judge had not charged the law. It falls therefore within the rule.

3. The omission of the judge to charge the jury on questions of law, though not of itself a reason for granting a new trial; yet if, in the absence of proper instructions, the jury should err, the verdict will be set aside, and a new trial granted.

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(1) 2 Bay, 520.

In *Morrison v. Muspratt*.(1) Action on a policy of insurance on the life of one Mrs. Elgin. At the trial, it appeared that a surgeon who had attended Mrs. Elgin for several years prior to February, 1821, but who had not seen her professionally in the interim, was applied to just before the policy was effected, to certify as to her state of health. He accordingly examined her on the 19th March, and afterwards certified that she was in good health, and was not afflicted with any disease which would tend to shorten her life. The insurance was therefore effected in April, 1823. Mrs. Elgin died of a pulmonary disease in April, 1824. Subsequently to February, 1821, and before the date of the certificate, Mrs. Elgin was under the care of another medical man, a Mr. Bland, who thought her consumptive. During this period, she had been twice alarmingly ill. The facts of the attendance of Mr. Bland, and the illness of Mrs. Elgin, were not communicated to the defendants at the time of the execution of the policy. The judge left it to the jury to say whether there had been any misrepresentation, but omitted to call their attention to the facts of Mrs. Elgin's illness, and the consequent attendance of Mr. Bland. The jury found for the plaintiff—damages £1000. And per *Burrough, J.*—"A material point in this case was not left to the jury, nor observed upon by the judge. The assurers were not informed that Mrs. Elgin, whose life they were about to insure, had been attended by Mr. Bland, who thought her extremely ill. Had they known this fact, they might have examined him."

So, in *Calbreath v. Gracy*.(2) An action on a policy of insurance of goods, where the important questions of charter-party, capture, abandonment and loss were involved. No charge was given to the jury, who found for the plaintiff. A rule to show cause why a new trial should

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(1) 12 Moore, 231.

(2) 1 Wash. C. C. R. 198.

not be granted, being obtained. *Washington, J.*—"Important points of law were involved in this case, and the court ought to have charged the jury upon them. Though their not having done so, is no reason *per se* for granting a new trial, yet there is reason to apprehend that under the circumstances of the case, justice has not been done. As the case now appears to me, the verdict does not seem to consist with legal principles; although I mean not to give any decided opinion. I think the ends of justice will be most likely to be attained, by granting a new trial."

So, in *Page v. Pattee*.<sup>(1)</sup> Action on the case, and verdict for defendant. The plaintiff moved for a new trial, alleging that the verdict was given against evidence, which is reported by the judge who sat on the trial. It is agreed by the parties, that after the evidence on each side was given to the jury, the counsel for neither party summed up his evidence, but left it to the judge to sum up and to give to the jury the necessary instructions. The judge reports that the evidence to support the plaintiff's demand was contained in certain depositions, which accompany the report, which were unimpeached, uncontradicted and unexplained, and were sufficient in the opinion of the judge, if believed by the jury, to support the plaintiff's declaration so clearly, that he apprehended no instructions were necessary, and accordingly none were given, but such as related to the allowing of interest to the plaintiff. *By the Court*—"It is our opinion that either party can lawfully claim from a judge trying his cause, the benefit of his instructions to the jury; and when such instructions are not given, on the ground that the case is too clear for one of the parties to render them useful, and the jury find for the other party, a new trial ought to be granted, that the jury may be assisted by the direction of the court."<sup>(2)</sup>

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<sup>(1)</sup> 6 Mass. Rep. 459.

<sup>(2)</sup> Vide 6 Monroe, 61.



So, if the judge comment on a piece of testimony, and leave it generally to the jury, without adding such views as to its credibility as the law requires the jury to consider. As in *Dunlop v. Patterson*.<sup>(1)</sup> One *Fuller* had been produced a witness and strongly impeached. The judge below had stated to the jury that *Fuller's* testimony was competent, and that they might give it such weight as they thought it deserved. Upon which, the court, by *Woodworth, J.*, observes—"After an attentive consideration of the evidence given by *Fuller*, it seems to me that this part of the charge was manifestly erroneous. The jury, it is true, are judges of fact, and the credibility of witnesses; but in the exercise of this power, they must be governed by the judgment of law on the facts. If the law has adjudged, that certain facts render a witness unworthy of credit, the jury cannot rightfully give credit to his testimony, or found a verdict upon it. They have no arbitrary discretion. It is their duty to follow the advice of the court as to the law. In this case, the charge gave them the most extensive range. Their attention was not called to the fact, that *Fuller*, by his own admission, had sworn falsely.—He was not, therefore, a credible witness, unless supported as to the material fact which he attempted to establish. The law will not permit either life or property to be put in jeopardy by such testimony. If it would, there must be but little security for either.—When the court instructed the jury to give the evidence the weight they thought it deserved, this implied that they had an uncontrolled discretion, to do as their judgments might direct, without any legal restraint as to the manner of exercising it.—The court ought to have charged the jury, that the testimony of *Fuller* was so strongly impeached as to justify them in disregarding it altogether; that the unsupported

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(1) 5 Cowen, 243.

testimony of a single witness, who swore, at one time, in direct contradiction to the testimony given by him, at another, in relation to the same transaction, was not entitled to credit, and ought not to be regarded. If the charge had been of such a character, it is probable the result of the trial would have been different. My opinion is, that this exception is well taken ; that the judgment be reversed, and a *venire de novo* issue in the court below.”(1)

And it is the right of a party to have the charge of the judge on questions of law, and if he refuse, and the jury err, a new trial will be granted, as in *Scott v. Lunt*,(2) in error, to the circuit court of the United States, in the District of Columbia. Action of covenant, to recover sundry rents, under a deed executed by General George Washington and wife, to the defendants intestate, by which a lot of ground was conveyed to Lunt, subject to the payment of an annual rent of seventy-three dollars. One of the covenants reserved to the grantor a right of re-entry on non-payment of the rent, and the defendants below set up the fact of re-entering, as one of his pleas on which issue had been taken. At the trial, the plaintiff prayed the court to instruct the jury, that the time at which the re-entry ought to be made, depended upon the lease given in evidence by the plaintiff, and could not be varied by the evidence ; and that if the jury found a re-entry, it must conform to the deed. The court refused to give the instruction, being of opinion, that it was competent for the actual tenant to waive any of the formalities required by law for his benefit.

*By the court*—“The instruction prayed has reference to the pleadings in the case. The averment there is, that the plaintiff entered on the premises under and by virtue of the condition of re-entry in the original deed, mentioned, for non-payment of the rent ; and upon the issue joined, this

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(1) Vide *Allen v. Young*, 6 Monroe, 136. Ante, p. 235. 2 S. C. Con. Rep. 323. *Newell v. Wright*, 8 Conn. Rep. 319.

(2) 7 Peters, 596.

was the material inquiry. It is clear, that, upon such an issue, no entry not conforming to that deed, and no evidence of an entry varying from it, would be admissible to support it. The sufficiency of the evidence before the jury to support the issue, was properly left for their consideration. But the defendant had a right to the instruction, that the proof must conform to the allegations in the pleadings. For these reasons, we are of opinion, that the circuit court erred in refusing the above instruction ; and the judgment must, on this account, be reversed, and a *venire facias de novo* be awarded.”(1)

But the judgment will not be reversed, if the jury, notwithstanding the omission to charge them on the point requested, find a correct verdict, and such as in justice it must have been, had the charge been given.(2)

4. If the judge send the case to the jury, when he ought to have nonsuited, the verdict will be set aside.

Although, by the English practice, a plaintiff cannot be nonsuited against his will, but may insist upon carrying his case to the jury,(3) with us a different practice prevails. Even an inferior court may nonsuit, where the plaintiff entirely fails to make out his case. In *Pratt v. Hull*,(4) in error, from a court of common pleas, where the court were of opinion that the plaintiff ought to have been nonsuited, but doubted their power, and sent the case to the jury, the supreme court, upon a bill of exceptions, reversed the judgment, observing upon the power to nonsuit: “This must be a power vested in the court. It results, necessarily, from their being made the judges of the law of the case, when no facts are in dispute. What the evidence before the court was, or whether they were correct in their judg-

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(1) Vide 3 Hawks, 5.

(2) *Douglass v. M'Alister*, 3 Cranch, 298.

(3) 1 Chit. Arch. 300.

(4) 13 Johns. Rep. 334.

ment, or not, are questions not now before us. We must assume that there was no dispute about the facts before the court, or any weighing of testimony falling within the province of the jury ; and therefore it was a pure question of law, whether, under a given state of facts, the plaintiff was, in law, entitled to recover. And unless this was a question for the court, there is no meaning in what has been considered a salutary rule in our courts of justice, that, to questions of law, the judges are to respond, and to questions of fact, the jury."

And in a subsequent case, *Stuart v. Simpson*,<sup>(1)</sup> it was held, that a court may, and it is their duty to nonsuit a plaintiff, if the evidence, in their opinion, will not authorize a jury to find a verdict for the plaintiff, or if they would set aside a verdict, if so found, as contrary to evidence. The right of a court of record, or even of a court not of record,<sup>(2)</sup> to direct a nonsuit peremptorily in their discretion, is with us no longer to be questioned. This principle being clearly ascertained, a refusal to nonsuit, when it ought to be granted, is equivalent to a misdirection, and will be treated as error.

In *Foot v. Sabin*,<sup>(3)</sup> in error. A bill of exceptions was taken, stating that the plaintiff below, proved that a note then produced, made by Lemuel Holmes, Abel Wilson, and William B. Foot, was signed by L. Holmes in his own proper hand, and with his name ; that the names of " Wilson and Foot, sureties," subscribed to the said note, was in the proper handwriting of the said Abel Wilson, and that the said Wilson and William B. Foot, at the time of making the said promissory note, were partners, as by the said plaintiff alleged, and there rested. The defendants had moved for a nonsuit, on the ground, that the plaintiff had not proved

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(1) 1 Wendell, 376.

(2) Vide *Elwell v. M<sup>r</sup> Queen*, 10 Wendell, 519.

(3) 19 Johns. Rep. 154.

the authority or consent of Foot to the making of the note. But the court were of opinion, that although the plaintiff was bound to prove the authority or consent of Foot to the making of the note, yet he had already done it, and thereupon directed the parties to proceed to the jury. Upon the point of refusing the nonsuit, the *court*, having recognised the principle that a court of common pleas has the power to compel a nonsuit, conclude thus—"On the ground then, that the court of common pleas refused to nonsuit the plaintiff below, when the evidence adduced entirely failed to make out his case, the judgment must be reversed, and a *venire de novo* issued from this court."<sup>(1)</sup>

And the true test of the propriety of the nonsuit is, that if the case had gone to the jury on the evidence, and the jury had found for the plaintiff, the court would have set aside the verdict, as in *Hoyt v. Gilman*.<sup>(2)</sup> On the trial of an action on a policy of insurance, the judge directed a nonsuit on the ground that there had been a fraudulent concealment of material facts, at the time of effecting the insurance; and the court refused to set aside the nonsuit, and grant a new trial. It was urged, upon exceptions taken to the nonsuit, that it was the proper province of the jury to have settled the facts, about which there was contradictory evidence, especially upon the question of fraudulent intention. It was conceded, that the judgment of law upon the facts was for the court. But, *Per Curiam*—"Whether fraud be a question for the court or jury, yet if, upon the facts in evidence in this case, the jury had given the plaintiff his premium, we should not have hesitated to set aside the verdict."

But although, by the English practice, the plaintiff cannot be nonsuited against his will; yet if he does not elect

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(1) Vide 10 Wendell, 461.

(2) 8 Mass. Rep. 336.

to go to the jury, but acquiesces in judgment of nonsuit, he waives the right of motion to set it aside. As in *Elsworthy v. Bird*.(1) Assumpsit against a husband, for not carrying into effect an agreement, alleged to have been entered into by him at the general quarter sessions of the peace, on behalf of his wife, being a compromise to pay and satisfy the prosecutor. The judge, at the trial, after the plaintiff rested, observed, that he could find nothing to leave to the jury in support of an action on such an agreement, and directed a nonsuit, plaintiff's counsel not objecting thereto. And on motion to set aside the nonsuit, the court discharged the rule, on account of the acquiescence at the trial.(2)

Much less will a new trial be granted, on the ground of misdirection, if, upon an intimation from the judge, the counsel elect to be nonsuited.(3)

*Butler v. Dorant*.(4) Action in assumpsit. Upon the trial, and after the parties had closed their respective cases, the judge was proceeding, in his summing up, to direct the jury, that the plaintiff, not having distinctly proved any special damage arising from the breach, was entitled to nominal damages only: whereupon *Best*, sergeant, for the plaintiff, elected to be nonsuited. He now moved for a rule *nisi* to set aside the nonsuit, and have a new trial, for a misdirection of the judge. *Lawrence, J.*—"His lordship did not say you should be nonsuited; he directed the jury that you should have nominal damages only; but you did not choose to trust your case with the jury. If there were a misdirection, you should have abided by the verdict, and have reserved the objection for a motion for a new trial. I believe this has never been done, that a counsel shall lie by until he hears the opinion of the judge at *nisi prius*, and

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(1) 1 M'Clelland, 69.

(2) Vide 2 Ld. Raym. 1370. 1 W. Black. 532.

(3) Gra. Prac. 269.

(4) 3 Taunt. 229.

that if he thereupon chooses to be nonsuited, he shall come to the court to set aside his own act." Rule refused.

So in the King's Bench. *Hutchinson v. Brice*.<sup>(1)</sup> The court refused to set aside a nonsuit, voluntarily suffered by the plaintiff, and to give him leave to reply *de novo*. He had replied—"That the cause of action arose within six years," which fact he could not prove. He wanted, therefore, to set aside the nonsuit, and reply *de novo*; which, if he had succeeded in, he would have replied—"That the writ of *latitat* issued within the six years." But the court said—"That that would make a quite new question; which the plaintiff had before pretermitted, and had put the issue upon quite another foot, and upon a point which he could not establish." Rule discharged.<sup>(2)</sup>

Nor will the court set aside a nonsuit on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff, at the trial of the cause.

In *Kindred v. Bagg*,<sup>(3)</sup> an action to recover for board and lodging, the plaintiff was nonsuited, and now moved for a rule to show cause, why the nonsuit should not be set aside, and a new trial granted. Upon the motion, the court, interposing, inquired whether the counsel for the plaintiff had expressed a desire that the question should be submitted to the jury; for, unless that were the case, they could not in fairness accede to the present application. *Shepherd* said, he was not instructed to state that they had desired it, and accordingly the rule was refused.

And yet, it has been ruled in the Exchequer, that submission to the opinion of a judge, declared by him at the trial to be for a nonsuit, does not estop a motion for a new trial, if his opinion be incorrect.

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(1) 5 Burrows, 2692.

(2) Et vide, *Robinson v. Cook*, 6 Taunt. 336.

(3) 1 Taunt. 10.

*Alexander v. Barker.*(1) Assumpsit for money lent and paid. The plaintiffs proved that credit was given by them to the company, for £200, and the defendant was debited in a like sum, for two further calls on his shares. It was contended, that this was a payment by one of the company, and not by the firm of *Alexander & Co.*, out of their own money. *Garrow*, B., who presided, being of opinion that the action should have been brought by *Dykes*, one of the firm, alone, nonsuited the plaintiffs. On motion to set aside the nonsuit, and for a new trial, Lord *Lyndhurst*, C. B., on the general question, was clearly of opinion, that the plaintiffs ought not to have been nonsuited. "As to the argument, that the learned judge was not applied to, to let the case go to the jury, cases have been cited in which the courts have refused to set aside nonsuits, when the counsel acquiesced at the trial, and did not insist on the case going to the jury. But as in those cases the courts above coincided in opinion with the judge at *nisi prius*, the principle on which they turn is not applicable where, as in this case, the opinion expressed by the learned judge at the trial, is held by the court to be incorrect. If a counsel assents to a nonsuit, on hearing from a learned judge, that if the case goes to the jury he shall direct them in a manner which the court above afterwards thinks incorrect, we are bound to consider the case as if it had gone to a jury with that direction, and a verdict had been found accordingly; and in such a case, the court may interfere, and grant a new trial." The other judges concurring, the nonsuit was set aside, and a new trial granted.

Should the judge, however, permit the plaintiff to go to the jury, when the evidence is wholly insufficient, and the jury find for the plaintiff, the court will set aside the verdict.

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(1) 2 Tyrwhitt, 140.



In *Brook v. Wood*.(1) Action in assumpsit. Plea, insolvency, and discharge; replication, a subsequent promise, and verdict for plaintiff. On moving for a rule *nisi*, it had been submitted, that it ought not to have been left to the jury; for that the subsequent promise proved, was not such a clear and explicit promise to pay, as would revive the demand, and render the defendant again liable to be sued on it, notwithstanding his discharge under the insolvent act:—that an absolute promise was in all such cases necessary, to revive the liability of the party—and that a mere admission would not have that effect; and on that principle the court granted the rule. *Graham*, Baron—"I think that under the circumstances, this rule should be made absolute. The evidence was extremely weak, and in my opinion, not sufficient for the jury to have proceeded on, and consequently ought not to have been left to them." *Hullock*, Baron—"I am of opinion that there was not sufficient evidence of such a specific promise, as it was necessary for the plaintiff to prove, in order to bind the defendant anew, after he had been discharged; and consequently this verdict cannot be sustained."

But if there be any evidence, and the judge send the case to the jury, the verdict will not for that reason be set aside. As in *Rogers v. Brooks and wife*.(2) Action on the case, disturbance of a pew, by defendant's wife, and verdict for the plaintiff, one penny. At the trial, the plaintiff proved possession for thirty-six years, and notice to the defendant's wife not to sit there. The judge told the jury that after so long a possession as thirty-six years, they might presume a legal title in the plaintiff. The jury, without hesitation, found a verdict for the plaintiff. Motion for a new trial, on the ground that there was no evidence to be left to a jury: because from the plaintiff's own wit-

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(1) 13 Price, 667.

(2) 5 Magon, 240.

nesses it appeared that the seat was common forty years ago. Lord *Mansfield*—"The question in this case is, whether there was *any evidence* at all to be left to the jury. The plaintiff's title to this pew is, that it has immemorially belonged to the house which he possessed. The defendant has set up a joint title in right of the house, enjoyed by himself and another person. The plaintiff, in support of his claim, proved that he was put in possession of this pew by the rector and church wardens, thirty-six years ago. The question is, whether this act of the rector was to give possession under an old immemorial right, or in consequence of a new gift. There are strong reasons to induce us to suppose it was not a gift. They would not make a gift of that which other people claimed." And, *per Curiam*, rule discharged."<sup>(1)</sup>

But the error, in refusing to nonsuit, will be cured by proof, subsequently supplied, whether by plaintiff or defendant. As in *Murray v. Judah*.<sup>(2)</sup> Action in assumpsit. After the plaintiff had rested, a motion was made for a nonsuit, which was overruled by the judge, and an exception taken. The case went on, and the requisite evidence was afterwards supplied. Upon which the court observe—"The first point made on the part of the defendant is, that the motion for a nonsuit ought to have been granted, no demand of payment of the check at the bank having been then proved. It is a sufficient answer to this point, that *a demand was subsequently proved*. That such demand was necessary to entitle the plaintiff to recover from the drawer is well established. A check is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay money; but it is an undertaking, on his part, that the drawee shall accept and pay; and the drawer

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(1) Et vide, 2 Gill & Johns. 382.

(2) 6 Cowen, 484.

is answerable only in the event of the failure of the drawee to pay." And this proof having been subsequently supplied, by the plaintiff, a new trial was denied.

So, in *Lansing v. Van Alstyne*.<sup>(1)</sup> Plaintiff declared on a lease for rent due by the defendant, as assignee. The defendant pleaded that all the estate of the assignor did not come to him by assignment. On the trial of the cause, the plaintiff insisted that he was entitled to recover without offering any proof, the pleadings admitting his right, and the presiding judge ruled accordingly. It would appear, from the opinion of the court, the judge had been asked to nonsuit the plaintiff, and refused, and the defendant afterwards supplied the evidence that was wanting, and per *Savage*, Ch. J.—“The defendant takes issue upon one fact only, viz: the assignment to himself. This averment then is denied, and as to this, it seems to me plain, that the plaintiff must prove the facts. The judge erred, therefore, in refusing to nonsuit the plaintiff. But it has often been decided, that although the judge err in refusing to nonsuit a plaintiff, still, if the evidence which ought to have been given by the plaintiff, is given in the course of the trial, a new trial will not be granted for such error. That principle is applicable here. Proof that the defendant is in possession of the demised premises, is *prima facie* evidence that he is assignee. The plaintiff ought to have given that proof if he did not choose to show the defendant assignee in any other manner; yet as the defendant himself proved that fact, a new trial must be denied.”

And in *Jackson v. Leggett*.<sup>(2)</sup> Action in ejectment. At the trial, the plaintiff produced a record of incorporations of religious denominations in the city of New-York, by one of which, a deed was given, conveying title to the premises in question. “The counsel for the defendant in-

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(1) 2 Wendell, 561.

(2) 7 Wendell, 377.

sisted, that the record produced was not evidence of the fact of incorporation, and that the original certificate of incorporation ought to be produced, which objection was overruled. The plaintiff rested, and the defendant moved for a nonsuit, which was denied, but afterwards supplied the testimony himself. The jury, under the charge of the judge, found a verdict for the plaintiff, subject to the opinion of the court. And per *Savage*, Ch. J.—“The first question is, whether the proper evidence was produced to prove the incorporation of the church. I am of opinion, the best evidence was not produced. The defendant objected to the record; the original certificate was higher evidence, and should have been produced, or its absence accounted for.—As the cause stood when the plaintiff rested, he should have been nonsuited; but if the defendant chooses to go into his defence, and supplies the evidence which the plaintiff ought to have produced, the reason for setting aside the verdict no longer exists. The defendant did so in this case; he did not produce the certificate, but he proved by parol, without objection, that the congregation had long existed, and was incorporated anew in 1809. This is a sufficient answer to the objection to the plaintiff’s evidence. It is an assertion by the defendant, that the fact was as stated by his witness.”

And a new trial will not be granted, where, on motion for a nonsuit, the judge declares the evidence to be sufficient to entitle the plaintiff to recover, and charges the jury to find for the plaintiff, if the evidence warrants the verdict. Thus, in *Dean v Hewit*; (1) action in *assumpsit*, on two promissory notes, by plaintiff, as endorser. To a plea of the statute of limitations, the plaintiff had replied a subsequent promise. After the plaintiff had rested, the defendant moved for a nonsuit. Among other causes for that,

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(1) 5 Wendell, 257.

the promise being conditional, the plaintiff was bound to prove that the defendant was able to pay. The judge denied the motion for a nonsuit, and ruled that the testimony was sufficient to entitle the plaintiff to recover ; to which decision the defendant excepted. The judge charged the jury to find a verdict for the plaintiff, for the amount of the notes, to which charge the defendant also excepted. The jury found for the plaintiff, and a motion was made to set aside the verdict. And per *Marcy*, J., delivering the opinion of the court—"It is to be observed, that the testimony was not withdrawn from the jury, but was in fact submitted to them, although accompanied with a positive expression of opinion, that it was sufficient to establish the condition, which rendered the new promise effective. The judge viewed the testimony correctly ; it well warranted the verdict. We cannot, therefore, interfere with the finding of the jury on that ground. If the sufficiency of the evidence to establish the ability of the defendant to pay could be questioned, the party might have had reason to complain that the judge had thrown the weight of his decided opinion into the scale against him."

5. If the judge give in charge to the jury questions of law, or if, where the issue consists of a mixed question of law and fact, the judge submits the whole issue to the jury, a new trial will be granted.

Questions of this kind are principally confined to negligence, usury, fraud, and malicious prosecutions ; in which it is difficult, if not impracticable, to trace with precision the line of demarcation between the province of the court and the jury. To all of these, the rule laid down in the supreme court, in *Dirver v. McLaughlin*,<sup>(1)</sup> that upon a conceded state of facts, the rest is a question for the court,

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(1) 2 Wendell, 596.

will apply. But what will constitute a conceded state of facts ; or how, where the facts are numerous and refined, and the statements contradictory, the case is to be distributed between the court and jury, are vexed questions. And until subjected to general rules, these classes of cases must continue to furnish, as they have done, constant grounds of mistake and misdirection, and prove a fertile source of new trials.

The question of fraud in the state of New-York, has been greatly simplified by recent decisions. The much agitated distinction, being rather nominal than real, between fraud in law and fraud in fact, has been exploded, whether as it relates to sales or voluntary conveyances, and the whole at last resolved into its simple elements, fact coupled with intent, and assigned to its appropriate province, the jury. The overthrow of this most embarrassing distinction, was accomplished by the very elaborate and perspicuous decision of the court in *Seward v. Jackson*.<sup>(1)</sup> In *Jackson v. Peck*, that soon followed, the principles deducible from the reasoning in the former case were recognised and applied by *Sutherland, J.*, who, in delivering the opinion of the court, observed—"The distinction which had previously been supposed to exist between fraud in law and fraud in fact, or actual fraud, appears to have been entirely exploded." And adopting the language of *Spencer, senator*, in that case, proceeds—"Strictly speaking, there is no such thing as fraud in law. Fraud or no fraud is and ever must be a fact. The evidence of it may be so strong as to be conclusive ; but still it is evidence, and as such must be submitted to a jury. No court can draw it against the finding of a jury." And applying the rule, he adds—"If the conveyance in question, therefore, were conceded to have been voluntary, the admission upon the trial, that

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(1) 8 Cowen, 406.

there was no fraud in fact, would seem to be sufficient to establish its validity.”(1) And upon this principle, the court decided the finding of the jury on the question of fraud, in this case, to have been conclusive.

Again, in *Jackson v Timmerman*,(2) whether a deed, executed by a parent to his child, in consideration of natural love and affection, is fraudulent or not, as against creditors, was held to be wholly a question of fact for a jury. The lessor of the plaintiff claimed, as purchaser at a sheriff's sale, on a judgment against one *Klock*, in favour of one *Haring*. The defendant claimed by virtue of a deed, dated anterior to the judgment, made by *Klock* to his daughter, in consideration of natural love and affection. The judge charged the jury, that the deed to the wife of the defendant being voluntary, was to be deemed in law fraudulent and void, as against *Haring*, who, at the time, was a creditor of the grantor, and as to the lessor of the plaintiff, who had succeeded to his rights; and that the plaintiff was entitled to their verdict. The jury found accordingly. The defendant moved for a new trial. *Sutherland, J.*, delivered the opinion of the court—“The judge erred in deciding as a question of law, that the deed from *George G. Klock* to his daughter, the wife of the defendant, was fraudulent and void against the then existing creditors of *Klock*, on the ground that it was voluntary. Whether fraudulent or not, was in this, as in all other cases, a question of fact for the jury. There is no such thing as fraud in law, as distinguished from fraud in fact. What was formerly considered as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now but *prima facie* evidence, to be submitted to, and passed upon by the jury. And on this ground a new trial must be granted.”(3)

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(1) 4 Wendell. 300.

(2) 7 Wendell, 436.

(3) Et vide, 8 Wendell, 9. 1 Dallas, 234. 2 Binn. 108. 495.

These decisions have settled the rule as to the branch of fraud growing out of conveyances alleged to be voluntary, and without consideration. The other class of frauds, connected with sales, where the vendor continues in possession, had been settled before, in *Bissell v. Hopkins*,<sup>(1)</sup> that possession in the vendor was only *prima facie* evidence of fraud, and might be explained; of the *bona fides* of which the jury, and not the court, were to judge, examining the alleged fraudulent intent by the evidence. This was, in other words, saying, that, upon a disclosure of facts explanatory of the transaction, the jury might by their verdict repel the presumption of law. The case came before the court on a special verdict, was ably argued, and upon a review of the cases, the much agitated question, how far possession by the vendor shall be evidence of fraud as to creditors, was put in as definite and enduring a position as it is probable it ever can be. *Savage*, Ch. J., delivered the opinion of the court—"I do not think it necessary to enter upon a minute review of the cases. *Kent*, Ch. J., has examined many of them, in *Sturtevant v. Ballard*,<sup>(2)</sup> and comes to the conclusion that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons to be shown to and approved of by the court, fraudulent and void as against creditors. The learned judge, no doubt, intended to say here, as in *Barrow v. Paxton*,<sup>(3)</sup> that possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained."

The subject was reviewed, and the former decision re-established in *Hall v. Tuttle*.<sup>(4)</sup> Action in replevin of a sloop, which was taken by the defendant, as sheriff, on an

(1) 3 Cowen, 166.

(2) 9 Johns. Rep. 338.

(3) 5 Johns. Rep. 261.

(4) 8 Wendell, 375.



execution against one *Hatch*. The question at the trial was, whether the title was in the defendant or in *Hatch*. It had been agreed, that Hall should become the surety of *Hatch* in the purchase of a sloop, to be the property of Hall, and under his control, until *Hatch* should pay the purchase money, when and not before, it should become the property of *Hatch*; and *Hatch* took a bill of sale of the vessel, in his own name, and took possession thereof, and subsequently assigned the bill of sale to Hall, retaining the possession of the vessel, the money for which Hall had become bound, remaining unpaid by *Hatch*, and the original agreement as to the eventual ownership, continued. The judge charged the jury, that the assignment of the bill of sale vested the title to the vessel in Hall; that being absolute in its terms, the question was presented, whether the possession of the vessel by *Hatch*, subsequent to the assignment, did not avoid the assignment on the ground of legal fraud—that the continuance of possession was susceptible of explanation—that there was no fraud in law, and that whether there was fraud in fact, was a question for the jury. The jury found for the plaintiff, with six cents damages and six cents costs. The defendant moved for a new trial, which was denied. *Savage*, Ch. J., delivered the opinion of the court. Having noticed the finding of the jury, repelling the fraud in fact, and repeated the language of Mr. *Spencer*, senator, in *Seward v. Jackson*,<sup>(1)</sup> “that strictly speaking, there is no such thing as fraud in law; fraud or no fraud is, and ever must be, a fact; the evidence of it may be so strong as to be conclusive; but still it is evidence, and as such must be submitted to a jury, no court can draw it against the finding of a jury.” The learned judge proceeds—“It has often been said by this court, that when there is no dispute about facts, fraud

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(1) 8 Cowen, 435.

is a question of law ; whether any given transaction be fraudulent or not, is a question of law ; the court pronounce the intention as inferable from the facts and circumstances. The question is generally a mixed one of law and fact. The court declare the law to the jury, and they, under the instruction of the court, find the fact and intent. If the instruction of the court to the jury in this case was correct, the verdict ought not to be disturbed. The judge stated to the jury, that the transaction between *Hatch* and *Hall* amounted to a mortgage, and therefore the possession in the mortgagor was consistent with the rules of law ; that possession by *Hatch* was susceptible of explanation, and was not fraudulent in law. 'The rule, as I understand it, is, that possession by the vendor or mortgagor, after forfeiture, is *prima facie* evidence of fraud, but that such possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and *bona fide*, that is, without any intent to delay, hinder, or defraud creditors or others, then the conveyance is valid, otherwise not.'(1)

The principle has been reiterated in the recent case of *Collins v. Brush*.(2) Action of trespass. On the trial, it appeared the vendor had been permitted to remain in possession three months, and had given no explanation. The judge charged the jury, that the only question was as to the fairness of the sale to the plaintiff ; that if that was a fair and honest transaction, the property belonged to the plaintiff ; if otherwise, the creditors of *Ayres*, the vendor, had a right to take and hold it ; but to entitle them to do so, it must be made to appear, that the sale was fraudulent, which was a question of fact for the jury. The jury found for the plaintiff. The defendants moved for a new trial. By the Court, *Sutherland, J.*—"The judge fell into an

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(1) Et vide, 1 Burr. 474. 2 Burr. 937. (2) 9 Wendell, 196.

error, in his charge to the jury, the property not having been taken possession of by the vendee, but having been left in the possession of Ayres, the vendor, from November, 1829, to March or April, 1830, the sale was *prima facie* fraudulent, as against the creditors of Ayres; and it was incumbent upon the plaintiff Collins, to repel that presumption, by showing some satisfactory reason for his omission to take it into his possession. It is not sufficient to show that the sale was upon a valuable consideration; some reason must be shown which the court can approve, for leaving the goods in the possession of the vendor; none was shown by the plaintiff. Indeed, the judge ruled that it was for the defendants to prove the fraud. In this he erred; they proved all that was necessary in their case in the first instance, when they showed that the possession of the goods was not changed. It was for the plaintiff to show an excuse for it."<sup>(1)</sup> New trial granted.

From a review of these cases, it is clear, that should a judge, on a question of fraud, now charge a jury to find merely whether the conveyance were voluntary and without consideration, or goods after a sale remained in possession of the vendor, reserving to himself the right to pronounce the law conclusively upon such a finding, the verdict would be set aside, and a new trial granted.

Actions for malicious prosecutions, and the question of probable cause, have given rise to innumerable applications for new trials, being mixed questions of law and fact. It has been well settled, that probable cause is a question of law to be decided by the court, upon the truth of a given state of facts, as found by the jury. The principle laid down in *Johnstone v. Sutton*,<sup>(2)</sup> has never been questioned.

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(1) Et vide, 3 Cowen, 189. *in notis*.

(2) 1 Term Rep. 493.

"The question of probable cause, is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law."

If the judge, therefore, leave the question of *probable cause* to the jury, the verdict will be set aside, and a new trial granted.

Thus, in *M'Cormick v. Sisson*,<sup>(1)</sup> Case for a malicious prosecution. The judge submitted to the jury upon the evidence, whether there was probable cause, and verdict for the plaintiff. The defendant moved for a new trial, and one of the grounds taken was, that the judge should not have submitted the question of probable cause to the jury, it being a mixed question of law and fact. And per *Woodworth, J.*, who pronounced the opinion of the court—"The judge erred in submitting to the jury the question whether there was probable cause. Whether the circumstances alleged are true, is a matter of fact; if true, whether they amount to probable cause, is a question of law. The verdict must be set aside, and a new trial granted."

And in *Pangburn v. Bull*,<sup>(2)</sup> in error. Action for malicious prosecution. Plea not guilty. The court charged the jury, if from the testimony before them, they should be of opinion that the prosecutions before the justice were malicious, and without probable cause, and that the defendant knew the facts to be so, before and at the time of such prosecutions, they ought to find damages for the plaintiff, otherwise they should find the defendant not guilty. The defendant excepted to the charge, and the jury found a verdict for the plaintiff. Several points were taken, but the principal one urged on the argument was, that the question

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(1) 7 Cowen, 715.

(2) 1 Wendell, 345.

of probable cause was erroneously submitted to the jury. By the Court, *Woodworth*, J.—“The question of probable cause, is a mixed question of law and fact. Whether the circumstances alleged, to show it probable or not probable, are true, and existed, is a matter of fact; but whether supposing them true, they amount to a probable cause, is a question of law. The court below erred in submitting both the law and the fact to the jury. This was necessarily the consequence of the charge.” It is deserving of notice, that in this case the judgment was affirmed, upon the ground, that if, upon looking into the case, the court find justice has been done, though the jury may have erred in assuming to pass upon the law, in pursuance of an erroneous charge, they will not reverse the judgment.

In *Masten v. Deyo*,<sup>(1)</sup> the plaintiff counted upon slander and malicious prosecution. The judge charged, that as to the count for a malicious prosecution, he was inclined to believe there was evidence enough given of probable cause to protect the defendant, but that it was the province of the jury to decide upon it under the evidence given, and if there was not sufficient evidence, to take it into consideration in their verdict. Verdict for plaintiff, and motion for a new trial, on the ground of misdirection. *Marcy*, J., in delivering the opinion of the court, treats the principle so, as at first sight, to induce a belief it was the intention of the court to change or modify the rule, but in his application of it, the learned judge's views do not appear to materially differ with the decisions cited above. After reviewing the authorities, he proceeds—“Where the circumstances relied on as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the conces-

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(1) 2 Wendell, 424.

sion of the parties, and they fully establish a probable cause, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited." Applying this principle, the learned judge adds—"I think the judge erred in not giving the defendant the benefit of his exposition to the jury, of the law relative to what constituted probable cause, in an action for a malicious prosecution. He should not have taken the cause from the jury, if there was the least doubt as to the existence of the circumstances alleged, as the probable ground of the criminal proceedings against the plaintiff; but he ought to have instructed them as to the law involved in the question, and as to what constituted a legal excuse for the defendant, and also whether the facts relied on in the defence, on the supposition that they should be found true by them, made out a probable cause."

And the rule equally applies to all cases where probable cause forms the gist of the action. Thus, in actions of trespass and false imprisonment, the question of reasonable and probable cause, if left to the jury, will vitiate the verdict. *Hill and wife v. Yates*.<sup>(1)</sup> Trespass for assault and imprisonment. Plea not guilty, and justification. *Garrow*, B., after the testimony was closed, told the jury, that if the defendants had shown that they had any reasonable or probable cause, they were entitled to a verdict. The jury found a verdict for the defendants. *Burrough*, J.—"What the judge left to the jury was, not whether they suspected, but whether they had reasonable and probable cause, which ought never to be left to the jury." *Dallas*, J.—"Reasonable and probable cause being matter of law, was matter on which the learned judge might have decided; but it ought not to have been left to the jury, and they ought not to have been asked whether they thought there was reasonable and probable cause. I think there must be a new

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(1) 8 Taunt. 182.

trial, in order that the judge may distinctly say, whether he holds that there is ground for reasonable and probable cause, and pronounce his direction thereon.”(1)

It seems to follow, as a necessary inference, that, probable cause being a mixed question of law and fact, and a rule of universal application, if on a conceded state of facts, the judge assume to dispose of the whole case, and nonsuit the plaintiff, the court will refuse a new trial.

In *Blachford v. Dod*.(2) Action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter. It appeared, that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to the defendants, demanding payment of them of the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount, and that he had instructions to that effect. The defendants were then summoned before a magistrate, to answer a charge of obtaining goods under false pretences. The plaintiff served the summons, and attended with his clients, and the complaint was dismissed. The defendants indicted the plaintiff for sending a threatening letter, and he was acquitted. He then brought this action, and the judge, without leaving any question to the jury, decided that there was reasona-

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(1) Et vide, 1 Wils. 232. 1 Greenl. 135. 15 Mass. Rep. 243.  
3 Wash. C. C. Rep. 32.

(2) 2 Barn. & Adol. 179.

ble and probable cause for preferring the indictment, and nonsuited the plaintiff. On motion for a new trial, the opinion of Lord *Tenterden*, Ch. J., with whom the other judges concurred, unanimously, in denying the motion, presents the general rule in an exceedingly clear point of view. "The first question," says his lordship, "is, whether I ought, under the circumstances of this case, to have decided that the defendants had or had not reasonable or probable cause for preferring the indictment against the plaintiff, or to have left that wholly or in part to the jury.—I have considered the correct rule to be this; if there be any fact in dispute between the parties, the judge should leave that question to them, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant.—There being therefore no fact in dispute, it becomes a pure question of law, whether, under the circumstances of this case the defendants had reasonable or probable cause for preferring the indictment against the plaintiff." (1) Motion denied.

With this agrees *Gorton v. De Angelis*, (2) which was an action for malicious prosecution. After the plaintiff had rested, the defendant moved for a nonsuit, on the ground, that no evidence of want of probable cause had been given. The judge decided, that on the evidence before him, the question of want of probable cause was a question of law, and that in his opinion, the plaintiff had failed to establish this essential ground of his action, and directed a nonsuit to be entered, which the plaintiff now moved to set aside. By the court, *Marcy*, J.—"It is said that probable cause is a mixed question of fact and law, and the facts in this case should have been submitted to

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(1) Et vide, *Ravenga v. M<sup>r</sup> Intosh*, 2 Barn. & Cres. 693.

(2) 6 Wendell, 418.



the jury, for them to infer a want of probable cause. What is meant by the expression that probable cause is a mixed question, and when it is proper to submit it to the jury to pass on, is explained in *Masten v. Deyo*.<sup>(1)</sup> If the facts, which are adduced as proof of a want of probable cause, are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed on, the question of probable cause should go to the jury, with proper instructions as to the law ; but where there is no dispute about the facts, it is the duty of the court, on the trial, to apply the law to them. In this case, there was no contest about the facts, no conflict in the testimony, no impeachment of the witnesses. We cannot therefore say the judge erred in assuming to himself to pronounce upon the legal effect of the evidence."<sup>(2)</sup>

But the motive of the defendant is open to the examination of the jury as a question of fact, and the giving it in charge to the jury will not be such a misdirection as to induce the court to grant a new trial.

In *Taylor v. Willans*,<sup>(3)</sup> in error. Action for maliciously indicting the plaintiff for perjury. The judge, in his direction, told the jury, that if the defendant did not appear at the trial as a witness, from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff ; but if his non-appearance did not proceed on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The defendant offered no evidence, and the jury found for the plaintiff ; a bill of exceptions was taken, and the objection stated to the summing up was, that the judge himself ought to have determined upon the facts whether

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(1) Supra p. 296. (2) Vide *Burt v. Place*, 4 Wendell, 591.

(3) 2 Barn. & Adol. 845.

there was probable cause, without leaving any question to the jury. Lord *Tenterden*, Ch. J.—“The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is in some degree a negative, and the plaintiff can only be called upon to give some, (as *Mr. J. Le Blanc*, a most accurate judge, says,) slight evidence of such want. As then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact? What conclusion they would draw is another thing. The question of probable cause is, indeed, a mixed question of fact and of law, and the rule as expressed in *Johnstone v. Sutton*,<sup>(1)</sup> is correct. The judge is to give his opinion on the law, and to leave the jury to determine the facts, which include the motives of the parties; and where he tells them, if they think the prosecutor had a certain motive for his conduct, then there was probable cause; but if he had not that motive, then there was no probable cause, I think such a summing up does properly separate the law from the fact, and is conformable to the rule.” The other judges concurring, the judgment was affirmed.<sup>(2)</sup>

6. In ordinary cases, notwithstanding a misdirection, if the court see that justice has been done, and that a new trial ought to produce the same result, a new trial will not be granted. Thus in *Smith v. Page*,<sup>(3)</sup> in ejectment. The plaintiff was a mortgagee and claimed by surrender, whereas the land was not copyhold; and the defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the court would not set it aside and grant a new trial against the honesty of the cause.<sup>(4)</sup>

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(1) 1 Term Rep. 493.

(2) Et vide, *Nicholson v. Coghill*, 4 Barn. & Cres. 21.

(3) 2 Salk. 644.

(4) Et vide, *Deerly v. Dutchess of Mazarine*, 2 Salk. 646.

In *Edmondson v. Machell*.<sup>(1)</sup> Action of assault and battery, for beating the plaintiff's niece, *per quod servitium amisit*. At the assizes. Another cause stood next for trial, brought by the niece against the same defendant, for the same assault. The counsel for the plaintiff declared their intention of not trying that cause, and withdrew the record. The defendant's counsel contended that the jury could only give damages in this cause for the loss of service. The learned judge thought the aunt stood in *loco parentis*; and, as in actions brought by a father for deflowering his daughter, whereby he lost her service, large damages had been often given, he thought this case bore an analogy to that; and that the jury had a right to give such damages as they thought just. Verdict for the plaintiff, and motion for a new trial, on the ground of misdirection. *Ashhurst, J.*—"An application for a new trial, is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice. It does not require much penetration to see what are the ends of justice, in the present case. It is certain that the girl herself ought to have some satisfaction for the injury she received; and as she consents not to try her action, the question is whether justice has not already been done; for it was admitted at the bar, that if the injury she sustained could be taken into consideration, in this action brought by the aunt, the damages which the jury have given are by no means excessive. Then there does not appear to be any ground for the defendant to call on the discretion of the court to send this cause down to be re-tried, on a technical objection in point of law. And all the judges are unanimously of opinion, that, as complete and substantial justice has been done, there is no reason to grant a new trial."

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(1) 2 Term Rep. 4.

So in *Cox v. Kitchin*.(1) Assumpsit. Plea general issue. It appeared at the trial, that the work was done for the defendant, living separate and apart from her husband, and in a state of adultery. The judge directed the jury, in case they should be of opinion that the defendant was living in a state of open adultery, at the time of the contract made, to find a verdict for the plaintiff; for as the husband, under those circumstances, would not then be liable, he thought that the wife must be liable herself. A verdict was accordingly found for the plaintiff. Motion for a new trial, on the ground of misdirection. *Buller, J.*—"This case comes before us without any point saved, and therefore we must look to the general justice of the case before we interpose by granting a new trial; nor is it necessary that we should nicely examine whether the defendant be strictly liable in point of law. The leading reported decision, on the subject of granting new trials, is that of the *Dutchess of Mazarine*.(2) There can be no doubt but that was the case of a verdict against law; yet the court said, that as the justice and conscience of the case were clearly with the verdict, they would not interpose. Here it is perfectly clear, that the husband was not liable.—Whether the wife be strictly liable or not, it appears she has lived as a *feme sole*, that she has represented herself as such, and has obtained credit under that character. The defence, therefore, is dishonest and unconscientious, and on that ground I think that the court ought not to interpose." The other judges concurring, the defendant took nothing by her motion.(3)

In *Brazier v. Clap*.(4) Upon a policy of insurance on a ship and cargo. The only questions submitted by the charge of the judge to the jury, were, whether the defend-

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(1) 1 Bos. & Pul. 338, and *in notis*.

(2) 2 Salk. 646.

(3) Vide 6 Taunt. 336.

(4) 5 Mass. Rep. 1.

ant deviated from the course specified in the policy, and if so, whether it was from necessity. There was a verdict for the defendant. No objection was made to the charge at the time; but on the sitting of the court by adjournment, about a fortnight after the trial of the cause, a motion was made by the plaintiff's counsel for a new trial, for a misdirection to the jury. *Sedgwick, J.*, delivering the opinion of the court, after commenting fully on the testimony, concludes—"Even if fault could justly be found with the judge's direction, I do not think that in this case a new trial ought to be granted. A new trial ought never to be granted, when the court is perfectly satisfied that on a second trial, the same verdict must by law be given, although there might have been some mistake in the judge at the trial." (1)

So, in *Remington v. Congdon*. (2) Action for a libel. Plea, general issue. At the trial, the defendants offered and read to the jury several depositions, stating what the plaintiff had sworn to before certain referees, and that what he had sworn to was false. The judge instructed the jury, that a complaint made against a member of a church, in the way of church discipline, was excusable, if there was probable cause for making it; that the decision of the church sustaining the complaint was *prima facie* evidence of probable cause; that if there was probable cause, it was incumbent on the plaintiff to show express malice, and that he had shown no evidence of that. The jury having found a verdict for the defendants, the plaintiff filed his exceptions to the instructions of the judge. *By the Court*—"It is true, one of the objections to the verdict is, that the judge stated to the jury that there was no evidence of express malice. This cannot be complained of, unless it is shown that there was evidence of that nature. We must suppose the plaintiff's counsel have made the best of their case in

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(1) Vide 7 Greenl. 442.

(2) 2 Pick. 310.

the exceptions drawn up by themselves, and as these contain no evidence of malice, we must suppose there was no such evidence in the case. Had there been competent evidence of malice, although in the opinion of the judge, not of much weight, so that the declaration that there was no evidence might be construed into an opinion of the effect of such as was offered, this might be incorrect. But even upon that supposition, if the evidence should now appear to us to be slight, a new trial, in a cause of this nature, would not be granted for that reason alone; for it would be idle to send a cause to a new trial upon evidence which, if received, would not be sufficient to support a verdict.”(1)

And in *Alsop v. Magill*.(2) Assumpsit for money had and received. Plea, general issue. The defendants became entitled to the proceeds of a certain brig and cargo, awarded to them by commissioners, under the treaty with Great Britain, as to prizes. The defendants had been allowed by the commissioners \$257.16, for the board and expenses of the plaintiff, as their agent, but which they had disallowed on his own account. The judge directed the jury, that the verdict ought to be in favour of the defendants, unless the jury should find that the sum claimed had been particularly awarded to the plaintiff by the commissioners, and received by the defendants. The jury found a verdict for the defendants, and the plaintiff moved for a new trial, which motion was reserved for the consideration of the nine judges. *By the Court*, after recapitulating the facts—“Whether the charge of the court was perfectly correct in point of law, it is unnecessary to determine. Justice is done, and a new trial ought not to be granted.”

So, also, when the sole effect of correcting the misdirection would be to settle the question of costs, as in *State of Connecticut v. Tudor*.(3) Information in the nature of

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(1) Et vide, *Ibid.* 145. (2) 4 Day, 42. (3) 5 Day, 329.

*quo warranto*, against the defendant. It appeared on the trial, that the term of office of the defendant had expired, and a new election had taken place. By the Court; *Ingersoll*, J.—“Though my opinion is, that the charge, in the present case, was incorrect, and the verdict wrong, yet I would not advise a new trial of the cause. The relator is not now kept out of any office, nor does the defendant now hold the office of first director, to deprive him of which the prosecution was commenced. A new annual election of officers has taken place, and it is but a matter of costs between the litigating parties, that a new trial would settle. This object is not of sufficient magnitude to demand a new trial.”

In *Hoyt v. Dimon*.(1) Action of *disseisin*. Plea, general issue. The defendant claimed by both a mortgage and an absolute deed, from one Nichols, against whom the plaintiff had issued an execution. The judge instructed the jury, that the only material fact for them to find was, whether the mortgage deed from Nichols to one Norton was fraudulent. Verdict for the defendant. The plaintiff moved for a new trial, on the ground of a misdirection. *Baldwin*, J., after recapitulating the evidence and applying the law, concludes—“If this reasoning is correct, the plaintiff has no reason to complain, that the only question submitted to the jury, was, the validity of the mortgage deed; for, having established that, their verdict must have been for the defendant, whether the absolute deed was fraudulent or not.” And new trial refused.

The same rule has been held to apply in all cases of a *frivolous* or litigious character, and where it is manifest the parties contend from motives of pride or vindictiveness, rather than of justice. Thus in *Hyatt v. Wood*.(2) Action of assault and battery. The plaintiff and the defend-

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(1) 5 Day, 479.

(2) 3 Johns. Rep. 239.

ant were in a meadow, which each claimed as his own, and each ordered the other to go out, when the defendant struck the plaintiff with a stick, and a scuffle ensued. The judge charged the jury, that if, at the time of the assault and battery, the defendant had not only the right of possession, but the actual possession of the lot, on which the assault was committed, the defendant was justified in using as much force as was necessary to prevent the plaintiff from trespassing upon him, and if the force or violence used was no more than was necessary for that purpose, they ought to find a verdict for the defendant. Verdict for the defendant, and motion to set it aside, on the ground of misdirection. *Per Curiam*—"It has frequently been decided in this court, that in cases where the damages are trifling, a new trial will not be granted, after a verdict for the defendant, merely to give the plaintiff an opportunity to recover nominal damages, and when no end of justice is to be attained by it, though there may have been a misdirection of the judge. The principle stated by the judge in this case was incorrect, but the action is of too little importance to grant a new trial for that reason."(1)

And in *Fleming v. Gilbert*.(2) Debt on bond. Plea, general issue and notice of special matter. The jury, under the direction of the judge, found a verdict for the plaintiff of six cents. The judge had ruled out evidence, as a defence, but suffered it to go to the jury, in mitigation of damages. *By the Court*—"There was a misdirection at the trial, in overruling the testimony offered as a defence to the suit, but as the recovery is but nominal, and the only contest is now respecting the costs of the suit, it cannot be advisable, that there should be a new trial, merely to give the defendant an opportunity to obtain, by a verdict, the

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(1) Vide 1 Johns. Cas. 250. 5 Johns. Rep. 137.

(2) 3 Johns. Rep. 528.



costs already accrued, together with the costs of such new trial. It appears, therefore, to be proper that the motion for a new trial should be granted, with this proviso, that the plaintiff may elect by the first day of the next term to discontinue without costs.”(1)

So, in a libel case, *Dole v. Lyon*.(2) The judge charged, among other things, that the defendant had been put on his guard against printing the libel, by the note of the author prefixed, stating that another printer had refused to publish it ; and that the jury might presume from this circumstance, that the defendant had been backed by the author or some other persons. The jury found a verdict for the plaintiff. A motion was made to set it aside, and for a new trial, and one of the grounds urged was the misdirection of the judge. Upon which, *Kent*, Ch. J., delivering the opinion of the court, observes—“The charge to the jury has been deemed erroneous, because it was observed, that the jury might presume from the circumstances, that the defendant had been backed by the author or some other person. The circumstance from which this might have been inferred, was the note to the defendant, with which the libel was introduced, which stated the libel had been refused a place in another gazette, putting him on his guard. The court are bound, on this subject, to judge how far the observation was material, as well as erroneous. It was said by Mr. Justice *Butler*,(3) that though the judge may have made some little mistake in his directions to the jury, yet if justice be done, the court ought not to interfere. The court are always bound in the exercise of a sound discretion on the subject of new trials, to determine how far the observation of the judge was material, and affected the merits of the case. Otherwise, as this court observed,

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(1) Vide *Ibid.* 533, *in notis.*

(2) 10 Johns. Rep. 447.

(3) *Estwick v. Caillaud*, 5 Term Rep. 425.

in *Fleming v. Gilbert*,<sup>(1)</sup> there would be no end to new trials, and the remedy would be worse than the disease." New trial refused.

The principle was strongly tested in the recent case of *Woodbeck v. Keller*.<sup>(2)</sup> Slander, for accusing the plaintiff of perjury. Plea, general issue, and notice of justification. The judge charged the jury, "that the two witnesses for the defendant, being contradicted by four witnesses on the part of the plaintiff, as to what the plaintiff did swear, the former were not to be believed. Also, that to sustain the justification, the defendant must prove the perjury by two witnesses; or by one witness, and circumstances tantamount to another witness. Verdict for the plaintiff, and motion for a new trial for the misdirection of the judge. *Sutherland, J.*, who delivered the opinion of the court, sustained the judge upon the part of his charge as to the justification. Upon the other, he observed—"The judge ought to have left it to the jury to decide between the witnesses. But if the jury ought to have come to the same conclusion, the strong charge of the judge in an action of this description, is not sufficient cause for granting a new trial. On the whole, I am of opinion that a new trial should be denied."<sup>(3)</sup>

The same rule applies in Pennsylvania, as in *Allen v. Sawyer*.<sup>(4)</sup> *Kennedy, J.*, observed—"It has been long since well settled by numerous authorities, that when the plaintiff has only entitled himself to claim nominal damages, and the jury find a verdict for the defendant, that the court will not set it aside and grant a new trial, unless the question of right or title to property of value should be involved in the suit, and affected by the verdict. Suits are

(1) 3 Johns. 528.

(2) 6 Cowen, 118.

(3) Vide *Feeter v. Whipple*, 8 Johns. Rep. 369. *Beers v. Root*, 9 Johns. Rep. 264.

(4) 2 Penn. Rep. 325.

not to be encouraged for the purpose of gratifying a mere litigious disposition, but to promote justice, by restoring parties to the enjoyment of those rights of which they have been deprived, and redressing those real injuries which they shall have sustained. It would be even an injury, or at least attended with a loss to the plaintiff, to grant him a new trial when the jury have found a verdict against him in a case in which, at most, he is only entitled to recover nominal damages."

The same principle has also been sanctioned in *Vermont*, in *Bullock v. Beach*,<sup>(1)</sup> and in *Kentucky*, in *Smith v. Surber*,<sup>(2)</sup> and *Hunter v. Dickerson*.<sup>(3)</sup>

7. Whether, and how far, the judges may transcend the limits assigned them, on questions of law, and express their opinions on the truth or weight of the testimony in their charge to the jury, has not been reduced to any fixed rule. It would appear from the practice in England, and in this country, in most, if not all of the states, a large discretion is allowed, and unless abused to the subversion of justice, the courts are disinclined to interfere. In other words, when the judge interposes his opinion strongly on the facts, and it is to be fairly presumed the influence of his opinion has misled the jury, and injustice follows, the verdict will be set aside. The general rule laid down in the English courts, and promulgated in a recent case, is, that the due degree of weight to be given by a judge directing the jury to particular evidence, which has been properly admitted, must be left to his own discretion, and his direction in that respect will not be revised by the court above. The case will best illustrate the rule.

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(1) 3 Vermont Rep. 73.

(2) 2 Marsh. Kent. Rep. 450.

(3) 2 Marsh. Kent. Rep. 546.

*The Attorney General v. Good.*(1) Information against defendant for having customable goods with guilty knowledge. The declaration of the wife, denying the husband to be at home when search was made, and which was untrue, was permitted to be given in evidence; and the chief baron, in his address, directed their attention to it as a circumstance tending to prove guilty knowledge. The jury retired to consider of their verdict, and after an absence of nearly two hours, returned, and asked the court whether they were to consider the conversation of the wife, as received in evidence. The learned judge answered in the affirmative, upon which they found a verdict for the crown. On motion for a new trial, it was contended that the judge ought not to have directed the jury to the wife's declaration as a proof of guilty knowledge. But the court unanimously discharged the rule, and per *Hullock, B.*—"I think that the evidence was admissible, and ought to have been left to the jury. If that be so, and the case were sent down again for trial, it would be again admitted; therefore the only ground remaining is, that too great effect was given to the evidence in the learned judge's direction. I apprehend that that would be a new ground for granting another trial, and would open a door to applications for that purpose to an extent incalculable. I am at a loss to know by what rule, the precise quantum of force, which should be attached by a judge to a particular piece of evidence, on a trial, is to be measured." Rule discharged.

But if the judge abuse the discretion reposed in him by the law, and not contented with expressing his opinion, undertakes to dictate to the jury on questions of fact, the verdict will be set aside and a new trial granted; Thus,

In *The New-York Fire Insurance Company v. Walden*,(2) in error, from the supreme court. The ground of

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(1) 1 M'Clell. & Younge, 286.

(2) 12 Johns. Rep. 513.

misdirection of the judge at the trial, and the reasons for reversal, are contained in the chancellor's opinion which prevailed. *The Chancellor.*—"The question is, whether there was error in the charge which the learned judge delivered to the jury. This charge was, that the several matters given in evidence on the part of the plaintiffs, were, in his opinion, conclusive evidence of the barratry of the master of the vessel on the voyage, and that the plaintiffs were not bound to communicate or disclose to the defendants, any of the letters, matters or circumstances, which were at the time of the insurance in their possession, relative to the master; and that the matters given in evidence, on the part of the defendants, were not sufficient to maintain the issue on their part, or to bar the action of the plaintiffs; and that if the jury agreed with him in opinion, they ought to find a verdict for the plaintiffs, and with that charge he left the matter to the jury." After a very learned opinion as to the information that ought to have been disclosed by the answers, and the materiality of such a disclosure, as an important fact in the cause that belonged to the province of the jury, the chancellor returns to the judge's charge, and having established the position that it must have been regarded as a direction in point of law, he proceeds—"All that I feel it my duty to contend for is, that whenever the judge delivers his opinion to the jury on a matter of fact, it shall be delivered as *mere opinion*, and not as direction, and that the jury shall be left to understand, clearly, that they are to decide the fact, upon their own view of the evidence, and that the judge interposes his opinion only to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt. It is for this principle that I feel solicitous, and not for any thing that may have taken place in this particular cause. The case before us is comparatively of trifling consequence; but the distinction I have suggested goes to the very root and essence of trial by jury, and may, indeed, become of inestimable value, and per-

haps, of perilous struggle, when the present generation shall have ceased to exist." There was judgment of reversal, on the ground that the jury had been prevented from exercising their judgment on the whole of the question.(1)

So, in the *Utica Insurance Company v. Badger*.(2) It was held, that proof of hand-writing of the endorser of a note, going no farther than that the witness believed it to be the hand-writing of the endorser, founded upon the facts of having seen him write his name two months before the trial, and also having seen him write five years before the trial, stating at the same time that he would not have been able to have testified to the hand-writing from the fact alone of having seen him write five years ago, and expressing doubts as to a part of the signature, would scarcely be sufficient to uphold a verdict, if the question as to its sufficiency had been properly submitted to a jury. It was also held, that where a judge, upon such evidence, in an action by the endorsees of a promissory note, charged the jury that the plaintiffs were entitled to a verdict, instead of leaving it to them, under proper instructions, to say whether the endorsement was or was not the hand-writing of the party, a new trial must be granted.

And, in Massachusetts, in a case where the judge, in his charge to the jury, had pronounced decisively upon the insufficiency of the testimony; *Aylwin v. Ulmer*.(3) Case against the defendant, as sheriff, for a false return. After the plaintiff had rested, the chief justice of the common pleas instructed the jury, that the same was not, upon the whole case, sufficient in law to maintain the issue for the plaintiff. Under these instructions, the jury returned a verdict for the defendant. The plaintiff thereupon ten-

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(1) Vide *Davies v. Pierce*, 2 Term Rep. 53.

(2) 3 Wendell, 102.

(3) 12 Mass. Rep. 22.

dered his bill of exceptions to the said directions, which was allowed and sealed. *Per Curiam*—"The charge of the chief justice of the common pleas was calculated to make the jury understand that the evidence offered was wholly insufficient. He stated correctly, that it was necessary they should be satisfied that the property was so received. But he also stated, that the evidence offered was not sufficient to maintain the action. This was undertaking to judge for the jury, and amounted to a declaration to them, that any consideration of the evidence was wholly unnecessary. They must thus have received the impression, that by law they could not, on that evidence, find a verdict for the plaintiff. And for this cause, the judgment must be reversed, and a *venire facias de novo* awarded."

In *Thefts v. Seabury*.(1) Action in assumpsit, and verdict for defendant. There was testimony on both sides. But the judge instructed the jury, that if they believed the testimony of one Chamberlain, a witness, they ought to find for the defendant. To this charge, on the ground of misdirection, the plaintiffs excepted. And *per Curiam*—"Taking the bill of exceptions as it stands, a new trial should be granted. The judge is represented to have told the jury, that if they believed Chamberlain, they ought to find for the defendant; whereas the proper instruction would have been, that they should find for the defendant, if upon the whole evidence they believed that a credit had been given. The verdict, therefore, will be set aside, though we are inclined to think that justice has been done.(2)

So, in a later case, *Morton v. Fairbanks*.(3) Action on the case for a fraud in the performance of a special contract, as to the manufacture of a certain quantity of

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(1) 11 Pick. 140.

(2) Et vide, Ibid. 162.

(3) Ibid. 366.

shingles. Among other evidence, a trunk full of what were alleged to be shingles, was brought into court, which upon inspection, the judge pronounced not to be shingles and so charged the jury, who found for the plaintiff. The defendant excepted to the charge, on the ground of misdirection. And, *per Curiam*—"The defendant contended that whether they were shingles or not, was a question of fact for the jury, and that his rights were not to be affected by the circumstance of the evidence being more or less strong on that question ; but it was ruled that as the point was clear upon inspection, it was to be decided by the court. As the jury would have the whole case before them, this may seem to be a speculative objection ; but we think that in strictness, the point thus decided was a question of fact, and the jury may have been unduly influenced, for they may have considered themselves not at liberty to find contrary to the decision of the court."

So, also, if the judge charge the jury on one or other of several grounds, inconsistent and repugnant. As in *Winchell v. Latham*.<sup>(1)</sup> Action on a promissory note. The plaintiff proved first, that the consideration was work and labour and cash lent. When that was impeached, he proved it was for several smaller notes, work, and a book account. And finally insisted upon certain declarations of his, given in evidence by the defendants, showing both of the considerations were unfounded. The judge was called upon to charge that any of the grounds would entitle the plaintiff to recover. And he charged accordingly. The court commenting on the charge, and especially on that part which directed the jury to find for the plaintiff, on his own declarations, offered in evidence by the defendant, that the note was given as surety for certain provisions to be inserted in a will, say—"Ought they not rather to have been charged, that the witnesses effectually destroyed each

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(1) 6 Cowen, 682.



other ; and that neither were entitled to credit ? That the plaintiff, by taking two contradictory grounds, had deprived himself of the benefit of both ?—If the plaintiff had acquiesced in the evidence given by the defendant, as to the consideration of the note, and had reposed himself upon it, as a legal consideration, there would have been no objection to it. But instead of that, he denies that that was the consideration, and produces a multitude of witnesses, to establish another, and entirely different one. He maintains, and he labours by his evidence to prove, that the declarations which he is shown to have made, as to the considerations, were false ; and yet the jury are instructed, that if they believe those declarations, the plaintiff is entitled to recover.—To permit those declarations, under such circumstances, to be used in this way, appears to me to be subversive of all morals. In this respect, therefore, we think the judge erred ; and that a new trial must be granted.”(1)

So in Virginia. *Fisher v. Duncan*,(2) on appeal. One of the questions decided in this case was, how far a court may instruct the jury, as to the sufficiency of evidence. Upon this point, the opinion of *Fleming, J.*, appears to have expressed the mind of the court. “It appears to me that the county court erred in having instructed the jury, that, from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations, which I conceive to have been an improper interference, and an infringement on the privileges of the jury, whose right it was to judge of the sufficiency or insufficiency of the evidence adduced, to establish any fact or facts in issue before them. The province of the court being to see that all proper evidence offered be submitted to their consideration, without saying what effect such evidence ought to have in the cause.” The judgment was reversed, and a *venire facias de novo* directed.

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(1) Vide 2 W. Blacks. 1249.

(2) 1 Hen. & Munf. 563.

8. Where the judge instructs correctly on points of law, a verdict will not be set aside on the ground of misdirection, although he may casually express his opinion on the evidence, as he proceeds in his charge.

Thus in *Hunt v. Bell*.(1) Action for a libel against the plaintiff, as proprietor of a building called the Tennis Court, appropriated to pugilism and other sports. At the trial, *Dallas*, Ch. J., first put it to the jury, to consider whether the plaintiff's exhibitions were not illegal, as tending to form prize fighters, declaring such to be his opinion at the moment, although he was unwilling to decide the point, without further time for deliberation, and he then recommended the jury to find a verdict for the plaintiff, which the defendant might afterwards move to set aside, and so fully discuss the question; but the jury found a verdict for the defendant. Upon motion for a new trial, the court unanimously sustained the view taken by the judge. *Richardson*, J.—“If the question were merely whether it is lawful or unlawful for persons to learn the art of self-defence, whether with artificial weapons or such only as nature affords, there can be no doubt that the pursuit of such an object is lawful; but public prize fighting is unlawful, and any thing which tends to train up persons for such a practice, or to promote the pursuit of it, must also be unlawful. The jury have found that the exhibitions in question have such a tendency, and I see no reason for disturbing their verdict.”(2)

In *Wakeman v. Robinson*.(3) Trespass for driving against plaintiff's horse and injuring him with the shaft of a gig. The judge directed the jury, after a full summing up, that this being an action of trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He

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(1) 1 Bingham, 1.

(2) Vide *Yates v. Foot*, 12 Johns. Rep. 1.

(3) 1 Bingham, 213.

did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable, nor was he requested to do so by the defendant's counsel. The jury found a verdict for the plaintiff. And on motion to set it aside, *Dallas*, Ch. J.—“If I had presided at the trial, I should have directed the jury, that the plaintiff was entitled to a verdict; because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called on to consider, whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do; and under all the circumstances, I am of opinion, that a new trial ought not to be granted in this case.”

So, in a recent case of usury, *Solarte v. Melville*.<sup>(1)</sup> The judge stated to the jury that in his opinion no usury had been committed, but left it to the jury to draw their own conclusions. The jury found against the usury. Motion to set aside the verdict for misdirection, and as against evidence. Lord *Tenterden*, Ch. J., now delivered the opinion of the court—“I left it to the jury, whether *Bramley* thought himself under an honorary engagement to pay the bankrupt; and that if he did, it was not usury. A new trial was moved for, on the ground that I ought to have intimated my opinion to the jury, and that I ought to have done so in a different way. I still think, and I believe one or two of my learned brothers are of the same opinion, that if *Bramley* thought himself under an honorary obligation, what was done was not usury. We all, how-

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(1) 1 Man. & Ryl. 198.

ever, think that, as notwithstanding my intimating such an opinion, I left it to the jury to draw their own conclusion upon the whole matter, we cannot disturb the verdict, in a case involving such penal consequences.”(1)

Nor will the verdict be disturbed, if the opinion of the judge upon the sufficiency or insufficiency of the testimony be clearly correct, however strongly it may be expressed. As in *Dean v. Hewitt*, it was held—A verdict will not be set aside, where on a motion for a nonsuit, the judge declares the evidence to be sufficient to entitle the plaintiff to recover, and charges the jury to find for the plaintiff, if the evidence warrants the verdict.(2)

Nor because the judge, in his charge to the jury, attempts to reconcile a discrepancy between the testimony of a witness on the stand and his former statement as to the same fact. As in *Jackson v. Packard*,(3) in ejectment. On the different relations given of the transaction by one Baker, a witness, the judge remarked, in his charge to the jury, that the discrepancy between his testimony and former statements seemed naturally enough accounted for. The jury found for the plaintiff, and the defendant moved for a new trial. And on motion, one of the grounds was, that the judge misdirected the jury in relation to the credit to be given to the witness. Upon which, *Sutherland, J.*, delivering the opinion of the court, remarks—“The observation of the judge, that the discrepancy between the testimony of Baker, and his former statements, seemed naturally enough accounted for, can hardly be considered a misdirection. It was nothing more than the expression of the opinion of the judge upon that point; but it in no respect assumed to take from the jury the right to judge for themselves upon the matter.”



(1) Vide *Swift v. Stevens*, 8 Conn. Rep. 431.

(2) 5 Wendell, 257.

(3) 6 Wendell. 415

So in *Colledge v. Hone*.<sup>(1)</sup> Assumpsit for goods sold. The defendant pleaded the statute of limitations; in answer to which a letter was produced, addressed by the defendant to the plaintiff's attorney, as follows—"I this day received your's respecting T. C.'s (the plaintiff's) demand: it is not a just one. I am ready to settle the account whenever T. C. (the plaintiff) thinks proper to meet me on the business. I am not in his debt £90, nor any thing like it. Shall be happy to settle the difference, by his meeting me in London, or at my house. I shall write Mr. C. (the plaintiff) on the subject." The lord chief baron, in summing up to the jury, told them that after the letter produced, the statute of limitations was entirely out of the question; and the jury accordingly found a verdict for the plaintiff. A rule *nisi* was obtained, that this verdict might be set aside. One ground was, that it should have been left to the jury to say whether the defendant's letter to the plaintiff's attorney, applied to the demand for which the present action was brought, or whether it amounted to an acknowledgment of an existing debt. The opinion of Mr. Justice *Park*, illustrates the rule, in a brief space. "Whether the meaning of the defendant's letter had been left to the jury or not, or whether in terms it applied to the transaction in question or not, appears to me to be immaterial, as it is manifest on the face of it, that the defendant admitted that something was due from him to the plaintiff. It is, therefore, absurd to say, that it does not import an acknowledgment of an actually existing debt."

Nor will the mere loose observations or speculative opinions of the judge, by way of illustration, affect the verdict. *Barksdale v. Brown*.<sup>(2)</sup> Action to recover the proceeds of rice. The judge charged, among other things, that the rolling of the rice out of the store, was a delivery of it

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(1) 10 Moore, 431.

(2) 1 Nott & M'Cord. 517.

to the purchaser ; and that the defendants could not have retaken it, without subjecting themselves to an action. But that if in such a case, it could be made to appear to a jury, that the purchaser was insolvent, and intended a fraud on the seller, they would probably give only nominal damages. On the contrary, if he should appear to have been trustworthy and honest, they might give very heavy damages. And per *Nott, J.*—With regard to the exceptions taken to the opinion of the court, it is sufficient to observe, it is admitted that the law was correctly stated to the jury ; and the mere speculative opinion of a judge, by way of illustrating any position, or in answer to the arguments of counsel, can never be a good ground for a new trial.(1)

And should the judge direct a verdict, without submitting the sufficiency of the evidence to the jury, when it is competent and uncontradicted, it will not be set aside.

In *Nichols v. Goldsmith*,(2) in assumpsit. The plaintiff made out his case, and objections were raised by the defendant, but no proof offered. The judge overruled the objections, and directed the jury to find a verdict for the plaintiffs, which they did. The defendant moved to set aside the verdict, and it was insisted the judge ought not to have directed the jury to find for the plaintiffs, but should have submitted to them the question of the sufficiency of the evidence. But, per *Savage, Ch. J.*—The evidence offered was competent, and, *prima facie*, sufficient. There is very little danger to be apprehended from such testimony, as the opposite party may rebut it, if it is incorrect. Being competent evidence, if uncontradicted, it is sufficient to warrant the verdict of the jury." Motion for new trial denied.

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(1) Vide, *Jordan v. James*, 5 Ham. Ohio Rep. 97. *Den v. Emerson*, 5 Halst. Rep. 279. *Williams v. Cheeseborough*, 4 Conn. Rep. 356.

(2) 7 Wendell, 160.

So, in *Train v. Collins*.<sup>(1)</sup> Assumpsit on a promissory note, made by one Hyde, to Samuel Learned, and by him endorsed to the plaintiff. One ground of defence was, that the note was for a usurious consideration. One of the jury, when about retiring with the cause, having asked what would become of the notes passed to Hyde, in case they should avoid the note in suit, the judge answered that they would remain the property of Learned, or of his assignee of this note. The verdict being for the defendant, the plaintiff moved the court to grant a new trial. The remark of the judge to the juror as above, was principally urged as a misdirection, in support of the motion. Commenting upon this, the *Court* observe—"No doubt many things are said by a judge in the course of a trial, which will not bear scrutiny, and which pass wholly without notice. It would be a bad practice to allow these matters to be brought up some days after the cause is decided, as the ground of a new trial. Even when the jury returned their verdict, stating the ground upon which it was given, had there been any previous intimation that stress was laid upon this incident, the jury might, and probably would, have been sent out again with the mistake corrected. We think it would be going too far, in a case where legal and equitable justice appears to be done by the verdict, to grant a new trial on account of a mistake, which did not probably, although it might possibly, have operated upon the minds of some of the jury."<sup>(2)</sup>

So, in a libel case, if the judge should state to the jury, that there was no evidence of express malice, when there was slight evidence of it, but not sufficient to sustain a verdict, this would not be a sufficient reason for granting a new trial. So ruled in *Remington v. Congdon*.<sup>(3)</sup>

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(1) 2 Pick. 145.

(2) Vide 1 S. C. Con. Rep. 216. 5 Mass. Rep. 101. 6 Mass. Rep. 350.

(3) 2 Pick. 310.

Nor is it a misdirection for which the verdict will be set aside, if the judge refer the jury to their own knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence. As was held in *The King v. Sutton*.<sup>(1)</sup>

Nor will the court disturb the verdict for a misdirection upon a collateral matter, or upon an abstract question out of the case, or but slightly connected with it. Thus, in *Depeyster v. The Columbian Insurance Company*.<sup>(2)</sup> Action on a policy. A verdict was given for the defendants, to set aside which, the court was now applied to, on the ground of a misdirection of the judge, stated in the decision denying the motion. *By the Court*—"It is said the jury were misdirected on a point of law. In calculating the cost of repairs, they were told that if they believed any were necessary on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate. This direction is supposed to be incorrect, inasmuch as it prescribes a rule difficult if not impracticable to follow. But admitting a mistake in the judge's charge, a new trial ought not always to be the necessary consequence. It is not for every misdirection in point of law, that the parties should be put to the expense of further litigation. If the result from the testimony would probably have been the same, whether a particular direction had been given or not, it can be no reason for granting a new trial. Here, if the jury had taken into the estimate the expense of all repairs, without any deduction for old or former injuries, their verdict must have been the same. If, then, there be good reason to think the plaintiffs have not been injured by the judge's mistake, they ought not to be indulged with a new trial."<sup>(3)</sup>

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(1) 4 Maule & Selw. 532, supra, p. 67. (2) 2 Caines, 85.

(3) Et vide, 9 Cowen, 674. *Finch v. Elliott*, 4 Hawks, 61.



Nor is it a ground for a new trial, that the judge, after having summed up the cause, instructed the jury, on motion of counsel, upon a point arising out of the facts in the case, but not previously suggested, such course of proceeding being a matter within the discretion of the judge. As in *Sawyer v. Merrill*.<sup>(1)</sup> Action of trespass. After the judge had ended his charge, the defendant's counsel moved to have the jury instructed, that if they were satisfied the articles claimed by the plaintiff were so intermingled with other property liable to attachment, that the defendants could not distinguish what had been attached, and if the plaintiff made a general claim of the whole, without designating the articles which he had attached, so that the defendants could have no means of knowing which had been attached, and which not, then that the defendants were justified in attaching the whole. This motion was objected to by the plaintiff's counsel, because this point had not been stated during the trial, and he had no opportunity to comment upon it. The judge so instructed the jury, and a verdict was returned for the defendants. *Per Curiam*—"The instruction to the jury was in itself correct. The objection is, however, rather to the time than to the matter of the instruction. It is said the plaintiff had not an opportunity to comment on the point made by the defendants, and to produce counteracting evidence. But the judge may think of some point which the counsel did not, or *vice versa*; and if it is based on the facts in the case, stating it to the jury will not be a ground for a new trial; and as no injustice appears to have been done, a new trial cannot be granted."<sup>(2)</sup>

So, in *Morris v. Brickley*,<sup>(3)</sup> it was held, where a plaintiff offers no testimony to the jury, or such as is so slight

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(1) 6 Pick. 478.

(2) Et Vide 4 Day, 403.

(3) 1 Har. & Gill, 107.

and inconclusive that a rational mind cannot draw the conclusions sought to be deduced from it, it is the right of the court, and their duty when applied to for that purpose, to instruct the jury that the plaintiff is not entitled to recover. But a positive and absolute direction to the jury will not be sanctioned, if it obliges them to discredit a witness; to do that, the intervention of a jury is peculiarly necessary.(1)

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(1) Vide *Reel v. Reel*, 2 Hawks, 63.

## CHAPTER X.

### VERDICT AGAINST LAW.

AFTER all reasonable precaution and care on the part of the counsel and the court, and the best intentions on the part of the jury, they may err in their finding. Through ignorance or misapprehension of the law, they may agree upon a verdict subversive of law. With a view to promote what they may conceive to be the justice of the case, and swayed more by their own views of equity than the unyielding principles of law, or hurried away by their own feelings, they are apt to overlook the principles of justice applicable to the case, and thus give rise to a new class of applications to the court, on the ground of *verdicts against law*.

It might appear at first sight gratuitous labour to illustrate this head of practice; as it is to be presumed the rule would be, invariably to set aside verdicts against law. But however this may be as a general rule, it is far from being universal. This renders it proper to treat of it, as the preceding causes for new trials have been treated, giving the general rules, with their exceptions and modifications, and adducing examples illustrative of each.”(1)

1. It is a general rule, that if the finding of the jury be clearly against law, the verdict will be set aside and a new trial granted. Thus,

In *Hyckman v. Shotbolt*.(2) One *William Shotbolt* was

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(1) Vide “Perverse Verdicts,” supra, p. 121—126.

(2) *Dyer*, 279.

bound in an obligation to one *Hyckman*, and in the obligation he was called *John Shotbolt*, which was a mistake. But *William Shotbolt*, well perceiving his misnomer, sealed and delivered the bond as his deed. In debt brought upon this bond against him by name of *William Shotbolt*, otherwise called *John Shotbolt*, he pleaded *non est factum*; and this special matter was found by verdict. Whether he should be charged by this bond and plea, was the doubt. The *postea* was special; and *Per Curiam*—"The plaintiff shall not recover upon this verdict, but it had been better for him to have brought the action by the name of *John*, as he is named in the bond, and then if he had appeared to it, and pleaded as above, *non est factum*, he should be concluded by the bond."

So, in *Watkins v. Oliver*,<sup>(1)</sup> in error. The plaintiff declared in debt against *Edmund Watkins*, otherwise *Edward Watkins*, that he, by the name of *Edmund*, was bound in an obligation for the payment of one hundred pounds, and for non-payment the action was brought. The condition was, that *Roger Watkins* pay fifty pounds to the plaintiff at such a day. The defendant pleaded payment by *Roger Watkins*, at the day; and issue being taken thereupon, it was found for the plaintiff, and judgment accordingly. Error was brought, for that *Edward Watkins* is obliged, and *Edmund* is sued, which cannot be intended one and the same person; and no averment can help it, for one cannot have two christian names, and there cannot be any estoppel. And of that opinion were all the judges. But if the condition had been, if *Edward Watkins* paid the fifty pounds, and the issue had been that the said *Edward Watkins* paid, and the verdict had found for the plaintiff, then the verdict should make it an estoppel; and the court should be ascertained that they were one and the same person. But as it is here

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(1) Cro. Jac. 558.

a stranger paying the sum which is so found, it cannot help the plaintiff. Wherefore, for this cause, the judgment was reversed.

And in *Maby v. Shepherd*.(1) Debt upon an obligation for forty pounds, by Edmund Shepherd. The defendant demanded oyer of the deed and of the condition which was entered in *hæc verba* "*noverint universi per præsentem me Edwardum teneri, &c.* in forty pounds," and he subscribed it by the name of Edmund Shepherd, which was his true name. The defendant pleaded *non est factum testatoris*. The jury found that it was the deed of the said Edmund Shepherd the testator. It was moved, that notwithstanding the verdict is found for the plaintiff, yet the judgment ought to be given against the plaintiff, for he declares upon a bond of Edmund Shepherd, and shows a bond of Edward Shepherd, which is another person; and they never were the same, but distinct names. And although it be subscribed by the name of Edmund, yet that is no part of the bond; which being apparent to the court, the plaintiff cannot have judgment. The whole court were of that opinion; and although the jury found it to be the deed of the said Edmund, yet that would not help it, for he ought to have brought his action according to the bond.

In *Bright v. Eynon*.(2) Action by the plaintiff, as executor of one Hannah Crisp, upon a promissory note by the defendant to the testatrix. The defendant set up a discharge, in writing, by the testatrix. The body of the discharge was all his own hand; but he called two witnesses who said they believed the name Hannah Crisp subscribed, to be the hand of the testatrix; but their knowledge of her hand was very slight, one of them having only seen her sign a receipt. It appeared from the report, that there were conceded facts sufficient to induce the jury to draw the con-

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(1) Cro. Jac. 640.

(2) 1 Burr. 390.

clusion of law, that the discharge was fraudulent and void: they, however, found for the defendant. Motion for a new trial, on the ground that the jury found against legal conclusions, directly inferable from the facts. Lord *Mansfield*, after expatiating at large upon the utility and practice of granting new trials, consented to a new trial, the other judges concurring, observing—"What I go upon is the apparent manifest fraud and imposition in obtaining the discharge from the testatrix, if she really signed it. Fraud or covin may, in judgment of the law, avoid every kind of act.—What circumstances and facts amount to such fraud or covin, is always a question of law.—The writing upon the face of it speaks imposition. It purports being for consideration. She releases the principal, in consideration of £5 per cent. during her life, which is only legal interest, and the precise rate he was obliged to pay by his note.—I left the question of fraud to the jury, without any express direction that the circumstances spoke fraud apparent."

So, in *Eddie v. East India Company*,<sup>(1)</sup> in assumpsit on two bills of exchange by the endorsers. Both bills were endorsed by the payee; but the words "or order" were originally omitted in the endorsement of one of them. On the first bill there was a verdict for the plaintiff, and on the second, for the defendant. It was now moved to set aside the verdict found for the defendant, on the ground that the jury had found directly contrary to the settled law, and had founded their verdict upon the custom of merchants, of which evidence was improperly permitted to be given at the trial; for the custom of merchants is part of the law; and the law being fully settled on this point, no evidence in contradiction to it ought to have been admitted, nor could any finding of a jury alter it. Lord *Mansfield*—"I thought at the trial, that the defendants might be at liberty to go

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(1) 2 Burr. 1216. Ante, 169.

into the usage of merchants upon this occasion.—I told the jury, that by the general law, (laying the usage out of the case,) the endorsement would follow the nature of the original bill, and be an absolute assignment to the endorsee or his order. And after having told them that this was the general law, then I left to them upon the particular evidence of the usage that had been laid before them.—Since the trial, I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it, and I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case, for the law is already settled.”(1)

And, in *Hodgson v. Richardson*,(2) where the jury found a verdict for the insured against an underwriter—though a material fact as to the commencement of the voyage was not disclosed, and therefore the contract different. Lord *Mansfield*, for this cause directing a new trial, took this distinction—“The question is, whether here was a sufficient disclosure; i. e. whether the fact concealed was material to the risk run. This is a matter of fact; and if material, the consequence is matter of law, that the policy is bad.”

In *Tindal v. Brown*,(3) Action on a promissory note, against the endorser. The reasonableness of the notice of non-payment to the endorser, became the most material question. Two juries had found for the plaintiffs, on the ground of the notice having been sufficient. It was now moved, that the second verdict should be set aside, as against law. *Erskine*, for the plaintiffs, admitted that it was not now to be disputed, that what should be considered to be a reasonable time was a question of law; but contended that in this case the plaintiffs had used due diligence, and relied

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(1) Et vide, 2 Burr. 931.

(2) 1 W. Blacks. 463.

(3) 1 Term Rep. 167.

upon the fact that the sum in controversy was small. The counsel for the defendant were stopped by the court, who referred to their former decision, and added—"That though it was true, in general, that the court would refuse to grant a new trial when the sum in litigation was small, yet that rule did not apply where a verdict had been given against law." On the third trial, a special verdict was found, containing the same facts, on which the court gave judgment for the defendant; and that judgment was afterwards unanimously affirmed in the Exchequer Chamber.(1)

So, also, in *Farrant v. Olmius*.(2) Covenant by lessor against lessee. The lease set out in the declaration contained, besides a common reservation of a certain fixed annual rent, the following *redendum*—"Yielding and paying the further yearly rent of £50 for every acre of the lands and hereditaments thereby demised, except certain fields mentioned in the former reservation, which the said defendant should plough, dig up, or convert into tillage. There were also covenants for repairing, and for delivering up the premises in repair. The judge directed the jury to find such damages for the breach of the covenant to repair, as in their judgment would be a compensation to him for the actual damage he had thereby sustained; and as to the other breaches, he directed the jury, that the plaintiff was entitled to recover damages at the rate per annum mentioned in the *redendum*. The jury brought in a verdict for £1100 damages, and being desired by the learned judge to specify how much they allowed for the repairs, and how much for the land, they stated that they found £500 damages for the repairs, and £600 in respect of the injury done to the land. A rule *nisi* was obtained for a new trial, on the ground that the jury were bound to give

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(1) Vide 2 Term Rep. 186. 3 Burr. 1663.

(2) 3 Barn. & Ald. 692.



the increased rent. *Abbot*, Ch. J.—“The jury, in this case, have given, by their verdict, a compensation for what they consider to be the actual damage sustained. when, in point of law, they ought to have given the increased rent. It is said, however, that the court ought not to disturb such a verdict, because it is consistent with justice. If that argument, however, were to prevail, it would encourage juries to commit a breach of duty, by finding verdicts contrary to law, and would enable them to set aside the contracts of mankind.—In this case there is an express contract for stipulated damages, and the jury have given a verdict for arbitrary damages. I am, therefore, of opinion, that there should be a new trial.”<sup>1</sup>

In *Turner v. Meymott*,<sup>(2)</sup> a tenant having omitted to deliver up possession when his term had expired, after a regular notice to quit, the landlord, in his absence, broke open the door, and resumed possession. The tenant having obtained a verdict against the landlord, in trespass for this entry, the court granted a new trial, on the ground that the landlord had a right to enter, and the verdict was against law. *Dallas*, Ch. J.—“The question is, whether the landlord has a right to enter in the manner the defendant did, under the circumstances of the case, in which the tenant held over after his right to possession had ceased, and the landlord's right to enter, had accrued. It must be admitted he had a right to take possession in some way. The case of *Taunton v. Costar*,<sup>(3)</sup> is in point, to show that he might enter peaceably, and that no ejectment was necessary.”<sup>(4)</sup>

In *Cook v. Green*,<sup>(5)</sup> The plaintiff brought this action

(1) Vide *Hopkins v. Meyers*, 1 Harper's S. C. Rep. 56.

(2) 1 Bingham, 158.

(3) 7 Term. Rep. 427.

(4) Et vide, *Davies v. Connop*, 1 Price, 53. *Hyatt v. Wood*, 3 Johns. Rep. 150. *Woad v. Hyatt*, Ibid. 239.

(5) 11 Price, 736.

of trespass, against the defendant, for breaking and entering a certain close, and choking and filling up a pond therein, and erecting a fence thereon ; and a verdict was found for the defendant. The *Chief Baron* directed the jury that it had been proved that the plaintiff was owner of the adjoining land, and that the rule of law was, that the owners of land adjoining a road, were entitled to claim property to half the soil of the road, unless a contrary right were proved ; and that he considered the weight of the evidence in this case was in favour of the plaintiff, but the jury found a verdict for the defendant. *Richards*, Lord Chief Baron.—“ In a case of this sort, we are of opinion that the verdict of the jury, under the circumstances in evidence, ought not to conclude the court, where the true object of the action is, the determination of a right, which it would be the effect of the verdict to decide conclusively. For the same reason, we think the extent of the trespass, and the damage, cannot be taken into consideration by the court, as an objection to our granting the plaintiff a new trial. We are all of opinion that there ought to be a new trial in this case.”

The same readiness to correct verdicts against law, has been manifested by the courts in this country as in England, although probably not to the same extent. The genius of our free institutions inclines rather to the popular views of a jury, than to the unbending rules of law in the mouth of a judge. In those states, however, that keep close to the path of English jurisprudence, the rigid principles of the common law are allowed to predominate, and few instances occur, permitting illegal verdicts to stand.

In New-York, as in England, the law controls the verdict. If therefore the judge, in his charge to the jury, state the principles of law correctly, and the jury disregard them, their verdict will be set aside, and a new trial granted.

As in *Jarvis v. Hathaway*,<sup>(1)</sup> where, although the motion for a new trial was refused, the court test the validity of the rule, by making it an exception to that class of cases commonly called hard actions. "In penal actions," say they, "in actions for a libel and for defamation, and other actions vindictive in their nature, unless some *rule of law be violated*, in the admission or rejection of evidence, or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success."

In a prior case, *Silva v. Lou*,<sup>(2)</sup> the court had, in conformity with the rule, granted a new trial. The case came up afresh on a motion for a new trial, after the second trial, in which the jury had given a verdict for the plaintiff, as before, upon evidence substantially the same. On the part of the plaintiff, it was insisted, that this was a second verdict on a question of fact, and ought to be conclusive. For the defendant, it was contended, that the evidence being materially the same, the finding of the jury was an attempt to overrule the decision of this court, on the questions of law formerly determined, and therefore ought not to prevail. And *Per Curiam*, *Lansing*, Ch. J., and *Lewis*, J., *dissentientibus*—"The jury, in finding this verdict, must have intended to disregard the determination of this court on the questions of law previously settled, and their verdict must therefore be considered as against law. It could not have been found in conformity to the opinion of the court, as formerly delivered, unless we suppose the jury to have been governed by conjectures, or circumstances too trivial to be mentioned. We therefore think that the verdict ought to be set aside."<sup>(3)</sup>

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(1) 3 Johns. Rep. 180.

(2) 1 Johns. Cas. 336.

(3) *Gibbins v. Phillips*, 8 Barn. & Cres. 437. *Center v. Stockton*, 8 Mart. Louis. Rep. 208. 9 Bingham, 115.

In *Van Rensselaer v. Dole*,<sup>(1)</sup> Action for slander, charging the plaintiff with being a highwayman and murderer. It appeared, on the day previous to the speaking of the words, there had been a public procession; that one Keating commanded a company, which formed part of the procession, attended with music; that a Mr. Bird claimed one of the instruments of music, but it was refused to be delivered; that upon this an affray ensued, in which Bird received a dangerous wound; and that the terms "highwaymen and murderers" were used, in reference to the transaction. The judge was of opinion that the words were fully explained, and therefore not actionable. The jury nevertheless found a verdict for the plaintiff. The defendant moved for a new trial, on the ground that the verdict was contrary to law. *Per Curiam*—"We agree in opinion with the judge at the trial. The words spoken by the defendant were clearly understood to apply to the transactions of the preceding day, and these were known not to amount to the charge which the words would otherwise import. Let the verdict, therefore, be set aside; and there being no question upon the evidence, the finding of the jury must be considered as contrary to law."

In a more recent case, *Jackson v. Parker*,<sup>(2)</sup> in ejectment. It clearly appeared from the evidence, that an assignment set up by the defendant in support of his title, was fraudulent in law. The jury, notwithstanding, found for the defendant. A new trial was moved for, chiefly on the ground that the verdict was against law, the assignment being void; and per *Savage*, Ch. J., delivering the opinion of the court, granting the motion.—"So far as the defendant Parker was influenced by motives of filial duty in undertaking to support the family of his profligate father, he should be commended; but if one object was, as

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(1) 1 Johns. Cas. 279.

(2) 9 Cowen, 73.

some of the witnesses stated, to prevent the judgment creditors from taking his father's farm, in satisfaction of their honest demand, such object is fraudulent. But it is, perhaps, unnecessary to impugn the motives of the defendant. If the object was purely to support his mother and the family, and that was to be done by means of his father's property, which his creditors had a right to have appropriated to the payment of his debts, then the assignment was fraudulent in law."

So in *Ross ad. Rouse*.<sup>(1)</sup> Action of slander. The plaintiff was a witness in a case submitted to arbitration between the defendant and one Timothy Rouse, and whilst he was testifying, the defendant addressing him, said, "Every word you have sworn to is false." And immediately after the arbitration, in the bar-room of the house where the arbitration was holden, added, "A. Rouse has sworn to a lie, and I can prove it." The plaintiff, it was clear, had sworn to matter wholly immaterial to the issue between the parties. The judge at the trial ruled that, although the arbitrators held the testimony immaterial, yet as they heard it, accompanied with the declaration that they could decide better by hearing the whole story, and as the witness testified, under the belief that he was giving material testimony, the words spoken were actionable, and so charged the jury, to which the defendant excepted. The jury found for the plaintiff. The defendant moved to set aside the verdict, on the ground that the words were not actionable; and per *Sutherland, J.*—"If the whole testimony given upon that trial by the plaintiff was immaterial, then no action can be sustained against the defendant for having said it was false. The evidence alleged to have been false, must be shown to have been material. The test is not whether the witness believes his testimony to be material, but whether, if false, he can be indicted for perjury. If it is

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(1) 1 Wendell, 475.

in fact immaterial, whatever may be the opinion of the witness, though it be false, it is not perjury. The charge was erroneous, and a new trial must be granted.”(1)

In Pennsylvania the rule prevails, and to the same extent. *Walker v. Smith*.(2) Rule *nisi* for a new trial. The court at the trial had laid down, as the rule for estimating the damages, the loss which the plaintiff had sustained by the misconduct of the defendant, in violating his orders. The jury had given only the principal sum due, without interest; and in this and other respects had, as was alleged, disregarded the charge of the court. And, although the motion on this ground was refused, the principle is thus laid down by *Washington, J.*—“If, indeed, the verdict were against the charge, we would not hesitate to do it, and would continue to do so, as often as such a verdict should be given. For, whilst we always respect and secure to the jury the privileges to which they are entitled, which is to decide upon the facts, we will take care that the rights of the court to decide the law shall never be impaired by the jury; and new trials will be granted so long as the verdicts are against law.”(3)

In *The Commissioners of Berks v. Ross*,(4) on appeal. The action was for debt on bond. There was no dispute about facts, and the charge of the court was in favour of the plaintiffs. But the jury, as another jury had done before, found for the defendants; and Judge Brackenridge, although the verdict was decidedly against his opinion, overruled a motion for a new trial, that it might be heard in bank upon appeal. *Tilghman, Ch. J.*—“Here is no dispute about facts. There was no discordance or difficulty in the evidence, but two juries have differed from

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(1) Vide *Olmsted v. Miller*, 1 Wendell, 506. *Harris v. Wilson*, Ibid. 511.

(2) 1 Wash. C. C. Rep. 202.

(3) Et vide, 4 Wash. C. C. Rep. 32.

(4) 3 Binney, 520.

the court in the law resulting from the facts. It is said by all the court, in the case of *Goodwin v. Gibbons*,<sup>(1)</sup> that there is no rule of law against granting a new trial after two verdicts. If there was such a rule, there would no longer be any certainty in the law. Principles the most firmly established might be overturned because a second jury were obstinate and rash enough to persevere in the errors of the first, in a matter confessed by all to be properly within the jurisdiction of the court; I mean, the construction of the law arising from undisputed facts. This is a state of things which no man would wish to see. I believe, that in this instance the two juries have erred from a principle of humanity. On one side, they saw a rich county, to whom the object of dispute, though in itself considerable, was not of much moment. On the other a few unfortunate individuals exposed to ruin.—But, when it is reflected that a precedent is about to be set, which may have a pernicious effect on those regulations on which the peace and security of the country depend, I feel it a duty incumbent on the court, to submit the matter to the deliberate consideration of another jury.”<sup>(2)</sup>

So, in Massachusetts. *Pierce v. Woodward*.<sup>(3)</sup> Action upon a parol contract not to set up the business of a grocer, within a certain limited distance in the city of Boston. There was much evidence tending to prove, that a principal inducement for the plaintiff to purchase, was the succeeding to the business which had been carried on in the same store, and it was proved to the satisfaction of the jury, that in order to induce the plaintiff to purchase, the defendant agreed not to engage in the same business. The jury found for the plaintiff with \$100 damages. And on inquiry upon what principle they proceeded, the foreman

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(1) 4 Burr. 2108.

(2) Et vide, 4 Binney, 180.

(3) 6 Pick. 206.

stated that they could not ascertain the damages for the precise time, it being very difficult to get a knowledge of the degree of injury done, and that they gave the sum of \$100, upon an expectation that it would settle the whole matter. *Per Curiam*—"A new trial must be granted, because the jury, in assessing damages, did not confine themselves to the period before the action was commenced. It is said, that we cannot interfere with the verdict, upon the declarations of jurors in regard to their proceedings, but that the evidence should come *aliunde*. The court are not disposed to disturb verdicts by making unnecessary inquiries; but where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found. Here the principle upon which they proceeded was incorrect."<sup>(1)</sup>

And in South Carolina. *Moore v. Cherry*.<sup>(2)</sup> Motion for a third trial, and to change the venue. This was a case tried to determine the right of property to a negro man slave, taken during the war, and sold to the defendant. The property was admitted to have been in Moore before the war, and immediately previous to the capture. *Grimke, J.*, who sat at the first trial, gave a charge decidedly against the defendant. The jury, however, returned a verdict in favour of the defendant; in consequence of which a new trial was moved for, and granted. At the second trial, *Burke, J.*, sat and charged in favour of the plaintiff, and the jury, notwithstanding the judge's direction, again found for the defendant. And now, per *Bay, J.*—"Wherever the jury find a verdict against the plain and obvious principles of the law, and against the directions of the judges who tried the cause twice, as well as against the opinions of the judges at bar, there ought to be a third trial; otherwise

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(1) Vide *Dillingham v. Snow*, 5 Mass. Rep. 547.

(2) 1 Bay, 269.



there can be no certainty in the principles of the law. In cases sounding in damages, which properly come within the province of a jury, the court will seldom or never grant a third trial : or in matters where law and facts are, in a great measure, blended together. But wherever the principles of law are outraged by these verdicts, we ought uniformly to grant a new trial, so as to give the party a chance for justice.<sup>7</sup> A new trial was granted. 1)

So, in *Peay ad. Picket*. 2) This was an application for dower. The declaration, as usual, stated the marriage and seisin of the husband : issue was joined, and the jury found a verdict for \$200 for the plaintiff. A motion was now made to set aside the verdict. Colcock, J., delivered the opinion of the court—"The jury had no power to find such a verdict. The issue submitted to them was whether the demandant was married, and whether her husband was legally seised. The verdict is therefore irregular, and must be set aside. If the jury had found the issue for the plaintiff, a writ of dower would then have been issued to commissioners, whose duty it would have been to have admeasured dower, or assessed a sum of money in lieu thereof, and then it may be made a question, whether she is to be endowed according to the improved value, or according to the value at the time of alienation : but in the proceedings had in this case, the question could not be involved."

And in *The State v. Hayward*, (3) where there had been a conviction for perjury, and the words stated in the indictment did not, from the face of the indictment, appear to be material, by averment, or by the context of the indictment, or by their own import, judgment was arrested.

And in *Bates v. McCarty*, (4) in an action of trover against two defendants, where a conversion had been

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(1) Et vide, 2 Bay, 23. 133, and 2 Nott & M'Cord, 184.

(2) 1 Nott & M'Cord, 16.

(3) 1 Nott & M'Cord, 546.

(4) 2 Nott & M'Cord, 84.

proven against but one, and a verdict found against both, a new trial was directed, unless the plaintiff discontinued as to the defendant, against whom no conversion was proved.

So, also, in *Dinkins v. Debruhl*,<sup>(1)</sup> in an action for an assault and battery, where an actual battery was proven, and there was a verdict for the defendant, it was set aside, the court holding, that the jury could not be permitted to find manifestly against law.

Upon another occasion, the same court recognised the rule in its utmost latitude, saying—"It is the province of the court to determine the law, and if juries will take it on themselves, and decide differently from the court, a new trial will be granted, *toties quoties*."<sup>(2)</sup>

2. But if justice has been done, the court will not, against the equity of the case, disturb a verdict upon the ground of a technical objection.

In *Deerly v. The Dutchess of Mazarine*.<sup>(3)</sup> Upon *non assumpsit* pleaded, the jury found for the plaintiff, though the dutchess gave evidence of coverture. But the court would not grant a new trial, because there was no reason why the dutchess who lived here as a feme sole, should set up coverture to avoid the payment of her just debts.

So in *Sampson v. Appleyard*.<sup>(4)</sup> *Trespass quare clausum fregit*. The defendant pleaded not guilty, and prescribed for a certain way leading from a common highway, into, through, and over the plaintiff's closes, in which, &c. The plaintiff by his replication traversed the prescription, whereupon issue was joined. At the trial of this cause, the counsel for the defendant having admitted the trespass,

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(1) 2 Nott & M'Cord, 85.

(2) 1 S. C. Con. Rep. 328, et vide, 2 Ibid. 103. 169.

(3) 2 Salk. 646.

(4) 3 Wilson, 272.

clearly proved the defendant's right of way. But it appeared upon the evidence, that this way did not lead from a common highway, but from a certain private way. It was therefore objected; that the defendant had not proved his prescription to the way. But the right to the way over the plaintiff's closes being clearly proved, *Gould, J.*, before whom the cause was tried, left it to the jury, who found a verdict for the defendant, for his right of way. A new trial was moved for, on the ground that the defendant had failed in proving his case, and the jury had found against the law. Lord Chief Justice *De Grey*—"This is a motion for a new trial, because the defendant, in his plea, has mistaken one abuttel of the way. If a new trial was to be granted, the defendant would amend his plea according to the evidence, and would have another verdict, in all human probability, having given such clear proof of his right by many witnesses." *Nares, J.*—"I am of the same opinion; and the court never grants a new trial, when they clearly see the merits have been fairly and fully tried." New trial refused *per totam curiam*.(1)

This principle is clearly stated in the leading case, *Bright v. Eynon*,(2) where it was said by *Denison, J.*, "That it would be difficult, perhaps, to fix an absolute general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken than explain it; but the granting a new trial must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice."

Being an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice, where they perceive complete and substantial justice has been done, they will not

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(1) Vide 2 Verm. Rep. 185.

(2) 1 Burr. 390.

discuss the question of law, nor suffer it to prevail to work injustice. 'This is the reason of the rule.

As in *Edmonson v. Machell*,<sup>(1)</sup> therefore where an action was brought by the aunt for a violent assault on her niece, for loss of service, and the judge held that the aunt stood *in loco parentis*, whereon large damages were given; the plaintiff undertaking to pay the damages to the niece, and the niece not to proceed in the action which she had brought for the assault, the rule for a new trial was discharged.

So, in *Farewell v. Chaffey*,<sup>(2)</sup> a new trial was denied upon the nature of the action, the value of the matter in dispute, and other circumstances of the case. Lord Mansfield said a new trial ought to be granted, to attain real justice, but not to gratify litigious passions upon every point of *summum jus*, and cited a number of cases where the verdicts were against the strict rule of law; but the court would not give a second chance of success to a hard action or unconscionable defence. Therefore the court upon the same principle, refused to grant a new trial in the present case, and discharged the rule.

And in *Allen v. Peshall*,<sup>(3)</sup> held by all the judges, that in granting new trials, regard is to be had to the true merits of the case; and when substantial justice appears to have been answered, the court will not suffer the chance of its being defeated.<sup>(4)</sup> This is forcibly put in *Estwick v. Cailaud*,<sup>(5)</sup> where the defence set up was fraud, and verdict for plaintiff. The court say, on an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case; for, though the judge may have made some little

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(1) 2 Term Rep. 4. Ante, p. 302.

(2) 1 Burr. 54.

(3) 2 W. Black. 1177.

(4) Vide Loft, 521.

(5) 5 Term Rep. 420.

slip in his directions to the jury, yet if justice be done by the verdict, the court ought not to interfere and set it aside."

In *Wilkinson v. Payne*,<sup>(1)</sup> the principle was strongly tested. The action was on a promissory note, in consideration that the plaintiff would marry the defendant's daughter. The defence set up was, that though there was a marriage, in fact, it was not a legal one, because the parties were married by license; the plaintiff was under age, and no consent of parents or guardians. It also appeared, that when the plaintiff came of age, his wife was *in extremis*, and died three weeks after. Upon these facts, the judge left it to the jury to presume a subsequent legal marriage, which they did, and found for the plaintiff. And upon motion to show cause why the verdict should not be set aside, the court denied the motion: and per Lord Kenyon, Ch. J.—"In the case of new trials, it is a general rule, that in a hard action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the court will not interfere by granting a new trial." Buller, J.—"If the verdict be consistent with the justice, conscience and equity of the case, we ought not to grant a new trial."

In *Cox v. Kitchen*.<sup>(2)</sup> The wife of one Wells, but living in a state of open adultery with a man of the name of *Kitchen*, was sued for work and materials in fitting up a hotel for her use. The judge directed the jury to find a verdict for the plaintiff, in case they should be of opinion the defendant was living in a state of open adultery at the time of the contract. A verdict was found accordingly, and on a motion to set it aside, on the ground that the defendant was not answerable as a *feme sole*, the court held this language: "Motions for new trials are governed by the discretion of the court, and therefore we must look to

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(1) 4 Term Rep. 468.

(2) 1 Bos. & Pul. 337. *Supra*, 303.

the general justice of the case, before we interpose for granting a new trial. Whether the defendant be strictly liable or not, she has lived as a *feme sole*, represented herself, and obtained credit, as such. The defence, therefore, is dishonest and unconscientious, and on that ground the court ought not to interpose."

In *Carstairs v. Stein*,<sup>(1)</sup> where the question arose, whether a commission of one half per cent. upon a banking account was usurious or not, it was held to be a question for the jury, depending on whether it may be ascribed to a reasonable remuneration for trouble and expense, or a colour for the payment of interest above five per cent. upon a loan of money. Verdict for plaintiff, and motion for new trial. And per Lord *Ellenborough*, Ch. J.—"The verdict ought to have effect given to it, unless it appears clear that the jury have drawn an erroneous conclusion. The court, in granting new trials, does not interfere, unless to remedy some manifest abuse, or to correct some manifest error in law or fact." Pointing to this case, a rule governing the general principle, in its application to particular cases, has been expressed with great precision. The rule as laid down is substantially this: it must clearly and manifestly appear, that the jury have given their verdict under a misconception of the law, or have given it believing what they ought to have disbelieved, or disbelieving what they ought to have believed. The rule of law which ought to govern a particular case, can always be ascertained; the state of facts is frequently doubtful, when it is peculiarly the province of the jury to decide the question; and wherever there is room to doubt, the court will not grant a new trial, because the inclination of their opinion is at variance with the verdict of the jury.

*Jones v. Darch*.<sup>(2)</sup> This was an action on a bill of

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(1) 4 Maule & Sel. 192.

(2) 4 Price, 300.

exchange, drawn by Thomas Aspull on the defendants, and accepted by them, in favour of William Aspull, and by him endorsed to one Booth, and by him to the plaintiffs. The defence set up was, that in point of law, the payee, who was of course the first endorser of the bill, being an infant both then and now, was not entitled to endorse, nor could, by his endorsement, give currency to the bill, or render it legally negotiable. But the cause being suffered to proceed, it appeared that all these circumstances were known to the acceptors, (the defendants,) and that the bill had been endorsed before they accepted it, and therefore the jury found a verdict for the plaintiffs. And the court refused a rule *nisi* to set it aside, saying, that as far as these defendants were concerned, who were proved to have known all the circumstances, before they accepted the bill, and as it appeared from the evidence, which the jury believed, to have been their object to get all the money they could by means of such bills; they ought not now to be permitted to avail themselves of the objection, whatever weight it might have had in a case of different circumstances.

So in *Gerbier v. Emery*,<sup>(1)</sup> the court refused to grant a new trial because the defendant would, in the event of the same being granted, compel the plaintiff to submit to a nonsuit, in consequence of a defect in the declaration, and thus defeat the justice of the case. "If we were," say the court, "to grant a new trial, it would be upon the terms of permitting the plaintiff to amend, and to add a new count, so as to omit that part of the case which states a promise by the defendant.—And it is obvious the new trial could be of no use to the defendant on these grounds."<sup>(2)</sup>

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(1) 2 Wash. C. C. Rep. 413.

(2) Et vide 1 Peters, 183. 4 Day, 42. 1 Hayw. 14. 2 Hayw. 132. 4 Ham. Ohio Rep. 513.

3. Nor will the court set aside the verdict in trifling actions, although the jury may have found against law. By the English practice, in addition to other suits frivolous in their nature, an action is considered as trifling when the sum to be recovered is under £20.(1) This of course is not meant to comprehend penal, nor what are called hard actions, sounding only in damages. And, although in this country no particular class of cases, nor any specific sum is designated, except in equity, as *infra dignitatem curiæ*; yet numerous cases have occurred, so utterly frivolous, as to fall within the principle of the rule.

In *Barker v. Dixie*,(2) case for a malicious prosecution of an indictment for felony, the jury found for the plaintiff, and gave 5s. damages. And upon motion for a new trial, on account of the smallness of damages, the court held there could be no new trial on that account; for this was not a false verdict, as finding for the defendant would be, and would subject them to an attain.

In *Marsh v. Bower*,(3) Action for words. The defendant's wife had said to the plaintiff's wife, who had been a witness on a writ of inquiry, "You have forsworn yourself, and your ears ought to be nailed to the pillory." The words were fully proved on the trial; but the jury found a verdict for the defendant. Lord Mansfield, who tried the cause on the home circuit, reported, that he expected a verdict for the plaintiff, but with very small damages, as the words were spoken in heat and passion, and never afterwards repeated. The court unanimously declared that they would not grant a new trial, for the sake of sixpence damages, in mercy to the plaintiff, as well as the defendant. And therefore a rule having been obtained to show cause

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(1) Vide 2 Tidd, 916. 2 Crompt. & Jer. 14. 5 Price, 334. 9 Price, 59, and 1 Tyrwhitt, Index, "New Trials."

(2) 2 Str. 1051. Et vide Ibid. 940. (3) 2 W. Blacks. 851.



why a new trial should not be awarded; they, without hearing the defendant's counsel, discharged the rule.(1)

So in *Burton v. Thompson*.(2) On showing cause against a rule for a new trial, Mr. Justice *Foster* reported, that it was an action for a libel; that the charge was proved by the plaintiff; that the injury done to him thereby appeared upon the evidence to be so very inconsiderable, that if the jury had found for the plaintiff, he should have thought half a crown, or even a much smaller sum, to have been sufficient; but that the jury had gone too far, and, instead of giving the plaintiff very small damages, had found a verdict against him. Lord *Mansfield*.—"It does not follow, by necessary consequence, that there must always be a new trial granted, in all cases whatsoever, where the verdict is contrary to evidence; for it is possible that the verdict may still be on the side of the real justice and equity of the case. Here the jury have found for the defendant, and the plaintiff must pay the costs before he can have a new trial.—I do not think that we ought to interfere, merely to give the plaintiff an opportunity of harrassing the defendant, at a great expense to himself, where there has been no real damage, and where the injury is so trivial as not to deserve above a half crown compensation."(3)

In *Brantingham v. Fay*.(4) Where, in an action of debt for a penalty in a special agreement, though the court were of opinion that the plaintiff was entitled to a verdict, but no damages were shown, nor any rule by which the jury could ascertain the damages, they refused to set aside a nonsuit and grant a new trial, merely to give the plaintiff an opportunity to recover nominal damages.(5)

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(1) Vide *Price v. Everitt*, 1 East, 583, *in notis*.

(2) 2 Burr. 664.

(3) Vide *Stevens v. Aldridge*, 5 Price, 334.

(4) 1 Johns. Cas. 255. Et vide 3 Johns. Rep. 239.

(5) Vide *Roberts v. Karr*, 1 Taunt. 495.

And in *Feeter v. Whipple*.<sup>(1)</sup> Case against defendant as sheriff for an escape. The plaintiff made out his case, and the judge charged the jury, that the plaintiff was entitled to recover in damages, as much as he had lost by the escape; and that they would be warranted to find a verdict for the plaintiff for \$45, the amount of property sold on the executions. The jury found a verdict for the defendant. A motion was made to set aside the verdict, which was submitted to the court without argument. *Per Curiam*—"The action is sounding in tort, the sum in controversy small, the value of the prisoner's property uncertain, and the evidence on that point contradictory; it is not a case for a new trial."

So, in *Hurtin v. Hopkins*.<sup>(2)</sup> Action for a libel, and proof for the plaintiff complete. The judge charged the jury that the publication was libellous, and that the defendant, having wholly failed in his justification, the plaintiff was entitled to a verdict. The jury found a verdict for the defendant. A motion was made to set aside the verdict and for a new trial. *Per Curiam*—"The general rule is not to grant a new trial, in actions of this nature when the verdict is for the defendant, and there is no other ground for the motion than that the jury have misunderstood or disregarded the evidence.—The case before us was not that of a very aggravated libel, nor were the cases, in general, of that character to which the rule has been applied. A jury would rarely, in a gross case of defamation, find a verdict against the plaintiff; if they did it would be pretty good evidence of prejudice, partiality or corruption. The court do not mean to lay down a rule for such extreme cases, but they certainly would not be

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(1) 8 Johns. Rep. 369.

(2) 9 Johns. Rep. 36.

justified, by the precedents, to interfere in the present case.”(1)

And in *ex parte Baily*,(2) on an application for a *mandamus*, the court having intimated that they would hold the courts below to the discharge of their duty in extreme cases, and would correct their decisions, where their discretion has been abused, say, in conclusion—“ Even where a verdict is *plainly against law*, the court may many times properly deny a new trial ; as, if the controversy be very trifling in its nature, or contemptible in amount.”(3)

In Vermont, in *Bullock v. Beach*,(4) the court adopts these positions, that a new trial will not be granted on the ground of new discovered evidence, if such evidence be merely cumulative ; neither will a new trial be granted, unless the court be of opinion that injustice has been done by the verdict ; nor will a new trial be granted where the amount in controversy is trifling.(5)

4. But where an important principle is involved, and the verdict is to be followed by serious consequences to the party against whom it is found, if against law, a new trial will be granted, without regard to the amount, or any other *collateral* matter.

This rule is sufficiently illustrated in the case of *Levi v. Miln*,(6) where the jury found for the defendant, although the plaintiff's case was clear. *Burrough*, J., cites, with approbation, a saying of Justice Buller, that the courts would not permit a jury to find contrary to the facts of the case.

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(1) Vide 4 Marsh. Kent. Rep. 450. 546. (2) 2 Cowen, 479.

(3) Vide 5 Johns. Rep. 137. 10 Johns. Rep. 447.

(4) 3 Verm. Rep. 73.

(5) Vide post, “ Smallness of Damages,” Chap. XII.

(6) 4 Bingham, 195. *Supra*, p. 123. Et vide *Vernon v. Hankey*, 2 Term Rep. 113.

So, in *Turner v. Lewis*.<sup>(1)</sup> Gurney moved for a new trial, on the ground that the verdict was against evidence, and the opinion of the learned judge before whom the cause was tried. It was an action of trespass for entering the plaintiff's close, and cutting down trees. Defendant pleaded the general issue, and *liberum tenementum*, which was denied in the replication. The question upon the trial was, as to the exact line of boundary in a fence between the plaintiff's and the defendant's land, and whether the trees were on the plaintiff's or the defendant's side. The jury, after a view of the *locus in quo*, found a verdict for the plaintiff, for the value of the trees cut down, and taken away by the defendant. The court, after inquiring what was the amount of the damages found by the jury, and ascertaining that they were under £20, suggested that the smallness of the damages might afford an answer to the application; but, upon Gurney's observing, that as the action was brought for the purpose of trying a right of a permanent nature, and which might become the subject of future litigation, this case was not affected by the general rule, that a new trial is not to be granted where the damages are under £20; the court assented to that proposition, and granted a rule *nisi*.

And the court will order a new trial on questions deciding important rights, where the judge expressed an opinion on the trial contrary to the verdict, although he afterwards report, that he was not dissatisfied with the finding of the jury. As in the *Earl of Mountedgecombe v. Symons*.<sup>(2)</sup> The plaintiff had brought an action on the case for diverting a water course. The jury found a verdict for the plaintiff. The defendant obtained a rule *nisi* for a new trial, on the ground that the finding by the jury was adverse to the direction of the judge. The judge reported

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(1) 1 Chitty's Rep. 265.

(2) 1 Price, 278.

that on the part of the plaintiff it was proved that the ancient bed of the water lay between the two estates. The defendant answered that, by proof that the stream had been diverted since the year 1790, and proved that he had used it to work a lead mine till 1803, when the work ceased: and that as soon as the mine was re-opened, he again employed the water as before. The judge then observed, that during the trial his inclination was in favour of the defendant, and that had he been on the jury, he should so have found; but he added that he was not dissatisfied with the verdict as it stood. *Thompson*, chief baron, having stated the case—"This question is, whether the property in this water belongs to one party or the other, and is certainly one of very considerable importance to their interest, as the verdict of the jury will have the effect of conclusively deciding the right on all future occasions; and therefore we think that it ought to go down to another trial."<sup>(1)</sup> And, although in ordinary cases, the ignorance or neglect of counsel will be visited on their client, as we have seen, yet where the verdict would prove decisive of his rights, to the irreparable injury of the party, the court will interpose, unless the counsel expressly waive the principle of law, which would have protected his client. As,

In the *Queen v. Corporation of Helston*,<sup>(2)</sup> the question was, whether, if upon a trial a point in law be started by the judge, and the counsel do not take it up, but insist upon other facts, which are found against them, whereas, had the counsel insisted upon the matter of law stirred by the judge, the verdict must have passed for them, this is sufficient cause to move for a new trial. *Parker*, Ch. J.—"The question in this case I take to be this, whether we are so bound down by forms of law, as that, though we see a verdict given contrary to a point of law, which the judge

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(1) Vide 11 Price, 736.

(2) 10 Mod. 202.

himself took notice of, and yet for want of the counsels' doing their duty to their client, was not insisted upon, we cannot grant a new trial. When a point of law arises, whether the counsel insist, or do not insist upon it, the judge is bound to direct the jury accordingly. But yet if the supporting of this verdict be of no more ill consequence than in point of costs, and the party has another remedy left him, then I am of opinion that the party ought to suffer for the neglect of his counsel. But if the verdict binds and concludes the right of the party, then I think it hard that the party should lose his right by a mistake or slip of the counsel.—There must be no new trial, and I so far assent to my brothers, that though a verdict should leave the party remediless, yet if the counsel do not only not insist, but expressly waive it, that then there ought to be no new trial."

5. It is a general rule, with but few exceptions, that in *penal* and, what are denominated, hard actions, the court will not set aside the verdict, if for the *defendant*, although there may have been a departure from strict law, in the finding of the jury.(1) Thus,

In *Sparks v. Spicer*.(2) One was ordered by the judge of assize to be hanged in chains; the officer hung him in *privato solo*. The owner brought trespass; and upon not guilty, the jury found for the defendant; and the court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

So in *Dunkly v. Wade*,(3) in case for negligently keeping his fire. A verdict was found for the plaintiff, and a new trial granted. But *Per Curiam*.—"Had a verdict been

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(1) Vide post, "Hard Actions," Chap. XIV.

(2) 2 Salk. 648.

(3) Ibid. 653.

for the defendant, we would hardly have granted a new trial, because it is a hard action."

In *Reavely v. Mainwaring*,<sup>(1)</sup> Action for taking plaintiff's apprentices away forcibly. It appeared the boys had been picked up by a press gang, headed by Walker, one of the defendants, but went with their own consent. A question arose, whether an action trespass *vi et armis* would lie, for it was said there was no force. On the other hand, it was urged the sending the press gang was sending a force. The jury found all the defendants not guilty. On a motion for a new trial, Lord *Mansfield*, who tried the cause, said, "I thought then, and now think, that Walker was liable to this action, because he sent a force, a press gang to take them. As to the justices, there was no colour to maintain the action against them. A special jury of gentlemen found all the defendants not guilty. I think they ought to have found Walker guilty, upon the evidence. Yet it would have been very hard if Walker had suffered for his behaviour on this occasion, because he seems to have acted with good intentions. Therefore I think there ought not to be a new trial." And by the whole court a new trial refused.

In *Ranston v. Etteridge*.<sup>(2)</sup> Action against a postmaster, for penalties. The plaintiff's case was clearly established, but the jury found for the defendant; and on motion for a new trial, on the ground that the verdict was against law, per *Abbott*, Ch. J.—"Without saying that the hands of the court are in all cases tied down, I must say thus much, that the court will not interfere without express proof of misconduct in the jury, and none such is here. I think they were mistaken, but that is not sufficient. They were mistaken, because this was a matter of direction in revenue law, and the provisions of that law were intended, and have been always held, to exclude all questions of in-

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• (1) 3 Burr. 1306.

(2) 2 Chitty's Rep. 273.

tention. That was their object. Perhaps the jury thought there was no intention of fraud; that was wrong, but was no misconduct." A new trial was refused.(1)

It may be proper to add, that of this class of cases, *slander* is emphatically one, where the court will rarely disturb the verdict if for the defendant, although against law. Indeed, it appears to have been regarded at one time as a rule so general, as hardly to admit of an exception. "The court," says *Holt*, Ch. J., "never, or very rarely grant new trials in actions for words."(2) This subject will be more fully discussed in its proper place.(3)

In all cases, however, much stress is laid on the opinion of the judge who tried the case; if he is satisfied with the verdict upon reflection, although against his charge, a new trial will generally be refused. As in *Green v. Speakman*.(4) Action of assumpsit for use and occupation, and verdict for the defendant, contrary to the opinion of the judge, who expressed his surprise at the result. *Vaughan* applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted. One ground was, that the verdict was directly contrary to the opinion of the learned judge. But the judge having manifested no dissatisfaction, upon reflection, the court observed, that although it was a general rule, that they would not interfere in cases where the damages did not exceed £20; and that, notwithstanding that rule might be dispensed with on particular occasions, still as the verdict in question did not appear to have been given on a mistake of law, although in opposition to the charge, there was no ground whatever for the present application.

And in *Cain v. Henderson*.(5) The defendant moved

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(1) Vide 3 Wils. 59. 4 Maule & Sel. 337. 1 Barn. & Ald. 63.

(2) 2 Salk. 644. (3) Vide post, "Hard Actions," Chap. XIV.

(4) 8 Moore, 339.

(5) 2 Binney, 108.



for a new trial in the circuit court, which was refused, and he appealed for various causes. Judge *Yeates*, upon reporting the case, said that he was not dissatisfied with the verdict; and the court thereupon remarked, that as to the point, that the verdict was against evidence, it must be a very strong case indeed, which would induce them to order a new trial, where the judge who tried the cause was not dissatisfied with the verdict.(1)

But if the judge who presided at the trial expresses his dissatisfaction with the finding of the jury, it will induce the court, at least in doubtful cases, to direct the cause to be sent to another jury for re-consideration.

In *Willis v. Farrer*,(2) there was a verdict for the plaintiff, and the defendant moved for a new trial. One ground was, that the finding of the jury was against the opinion of the judge, who was about to comment upon the evidence in favour of the defendant, when stopped by the jury, who instantly rendered a verdict against his opinion; and for this cause a new trial was granted.

So in *Pringle v. Gaw*,(3) Action in ejectment brought for eight inches of ground. The case before the jury turned entirely on matters of fact involving a question of boundary. The verdict was for the defendant, and the plaintiff now moved for a new trial, on the ground that it was against the evidence and the charge of the court. *Gibson, J.*, before whom the case was tried at *nisi prius*, having declared that, in his opinion, the verdict was greatly against the evidence and the justice of the case, the court, after having heard counsel in behalf of the defendant, ordered a new trial, without hearing plaintiff's counsel in support of the motion.

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(1) Et vide, 2 Serg. & Rawle, 119. 7 Ibid. 457.

(2) 3 Younge & Jervis, 264.

(3) 6 Serg. & Rawle, 298.

6. When the plaintiff would be entitled to the benefit of the verdict in another form of action, the court will not turn him round, by setting aside the verdict, upon the ground that he has not framed his action with technical precision.<sup>(1)</sup>

*Foxcroft v. Devonshire.*<sup>(2)</sup> This matter came before the court upon a motion for a new trial, on the ground of a misdirection by the judge who tried the cause. It was an action of *assumpsit*, brought for moneys had and received by the defendants, to the use of the plaintiffs as assignees of a bankrupt. The defendants pleaded *non assumpsit*, and issue was joined thereon. The cause was tried before Mr. Justice Noel, and a verdict found for the plaintiffs, with which the judge declared himself satisfied. Lord Mansfield, in delivering the opinion of the court, on a motion to set aside the verdict, said, that the counsel for the plaintiff had urged as a preliminary point, that the defendants were guilty of a fraud in paying bills of exchange drawn upon them by the bankrupt.—“Upon this preliminary point only,” observes his lordship, “it was left to the jury, and upon this point only they found their verdict. Upon hearing all the evidence they were of opinion, that the transaction was fraudulent on the part of the defendants, and they gave a verdict for the plaintiffs for the whole money, deducting only the commission due to the defendants, and the expenses of the sale of the goods. Though the ground of the verdict should be wrong, yet, if it clearly appeared to us now, that upon the whole no injustice had been done to the defendants, or if it clearly appeared to us now, that the plaintiffs, by another form of action, could recover all they have got by this verdict, we think the court ought not to grant a new trial.”

The rule was recognised and illustrated in *Aylett v*

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(1) Vide *supra*, p. 341.

(2) 2 Burr. 931.

*Lowe*.<sup>(1)</sup> Debt on *mutuatus*, for £200, and *nil debet* pleaded. On the trial, before *De Grey*, Ch. J., there was proof that the loan was for £100, and on motion for a new trial, the court refused to grant it, on the ground that, though the verdict was irregular, justice had been done.

And where the plaintiff has recovered a verdict for a sum of money, composed of several items, some of which he was not in strict law entitled to recover under the declaration in that form of action, but which he would be clearly entitled to recover by declaring in a different form, the court will not reduce the damages. *Mayfield v Wadsley*.<sup>(2)</sup> *Indebitatus assumpsit*. Plea, general issue, and verdict for plaintiff. A rule *nisi* was obtained for entering a nonsuit, on several grounds—that no evidence of part performance of the contract, by the defendant, had been shown; and that if even there were part performance, still this action was not maintainable within the fourth section of the statute of frauds, the contract being subsidiary to a contract relating to the sale of an interest in land. On the latter point, *Abbott*, Ch. J., after disposing of the question of nonsuit, observes—"Supposing that the plaintiff cannot recover the residue on a declaration for crops bargained and sold, founded on the original contract, on the ground that it is void by the statute of frauds, yet I think he may recover on a declaration, stating that the defendant was indebted for the value of crops sown by the plaintiff on land in his possession, and which the defendant was allowed to take, and for which he promised to pay. If the plaintiff is, in strict law, entitled to recover part of his demand in this action, and in another form of action would be entitled to recover the residue, we ought not to reduce the damages in this case, for this would only have the effect

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(1) 2 W. Blacks. 1221.

(2) 3 Barn. & Cres. 357.

of putting both parties to further expense, when the final result must be the same.”(1)

So in *Smith v. Elder*.(2) Special action on the case, brought against the defendant for putting on board of an American vessel, bound from New-York to Scotland, goods which, by the laws of Great Britain, were prohibited from being imported into that country in foreign vessels, in consequence of which the plaintiff's vessel was seized, and the master compelled to pay a large sum of money to procure her release. There was a verdict for the plaintiff, and a motion for a new trial, one ground of which was, that as the plaintiff had declared in *tort* the evidence was not sufficient to prove it, inasmuch as an action for a misfeasance, or *tort* cannot be maintained for an act done merely in contravention of the revenue laws of Great Britain. Upon this point the court, per *Van Ness, J.*, observes—“The defendant cannot avail herself of the first ground on a motion for a new trial. If the plaintiff has not disclosed in his declaration, a cause of action, cognizable by this court, that must be taken advantage of in another way.—But I think, if this objection were permitted to be urged, on a motion for a new trial, that it comes too late.”

So in *Van Slyck v. Hogeboom*.(3) Action of debt for the escape of one Van Alstyne, who had been surrendered by his bail, not in execution; the defendant was permitted to show the insolvency of Van Alstyne in mitigation. The jury found a verdict for the plaintiff, not for the debt, but for six cents damages and no more. *Per Curiam*.—“The action here was misconceived under the statute; debt for an escape lies only when the prisoner is in execution.—The action therefore for the escape, in this case, ought to have been an action upon the case, in which the measure of

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(1) Vide 8 Mass. Rep. 336. 1 Ham. Ohio Rep. 168.

(2) 3 Johns. Rep. 105.

(3) 6 Johns. Rep. 270.

damages is open to the investigation of the jury, and not in action of debt, in which the whole judgment is to be recovered, or nothing. But as the defendant was here permitted to avail himself of every defence, equally as if the action had been case, and not debt, and as only nominal damages have been recovered, it is unnecessary to set aside the verdict, merely for the sake of giving the defendant an opportunity of getting rid of the suit; for as the verdict stands, the defendant will recover costs."

So in *Cogswell v. Brown*,<sup>(1)</sup> cited above, where the objection was taken to the form of action, insisting it ought to have been trespass and not *assumpsit*. The court say substantial justice has been done, and the court will not turn the party round upon a formal objection.

And in *Booden v. Ellis*.<sup>(2)</sup> Trover for cord wood. The evidence clearly showed the action was misconceived; but the court said, that although the form of action adopted in this case was liable to many objections under the particular circumstances, they were all agreed, that when justice had been done in the form of an action, upon which the verdict had been found, it was not in their discretion, nor were they required by the agreement of the parties, to disturb the verdict upon a question of form only, and especially where, in adjusting the demand, the defendant had every advantage which he could have had, under any other form of action.<sup>(3)</sup>

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<sup>(1)</sup> 1 Mass. Rep. 237.

<sup>(2)</sup> 7 Mass. Rep. 507.

<sup>(3)</sup> Vide *Livingston v. Harman*, 9 Mart. Louis. Rep. 657, and *Bush v. Critchfield*, 4 Ham. Ohio Rep. 117.

## CHAPTER XI.

### VERDICT AGAINST EVIDENCE.

FACTS are peculiarly the province of the jury. Whether the proof offered be competent, is for the court—whether it be sufficient, when produced, is for the jury. *Ad questionem legis, judices, ad questionem facti, juratores, respondent.* But in weighing the testimony, the passions and prejudices of the jury are apt to mingle, or from ignorance or misapprehension, or mere obstinacy, they may arrive at a result, directly at variance with the truth of the testimony. The verdict ought to be, as the name implies, the very enunciation of truth. But it is not always so. It is frequently bottomed upon a superficial and partial examination of the testimony, and announces a result, directly repugnant to the evidence, as a whole. It is then a verdict against evidence, and calls for the interposition of the court. To permit it to remain, would be to sanction injustice ; and to deny the court the power to correct the flagrant abuses of the jury, would be to bring the administration of justice into contempt, and render the boasted trial by jury, a great public evil. The courts have the power to correct, and are in the constant habit of exercising it, on this ground, limited only by their own discretion, guided by such precedents as experience has furnished. Although, owing to the ever varying aspect of cases, it is impossible to reduce the practice on this head to rules of universal application, yet we are not without some well settled principles, forming the outlines, and giving consistency to this

very prolific source of judicial decision. These rules vary with the degrees of evidence, as they are graduated by successive decisions, from the point of incredibility to that of moral certainty; and as the truth of the finding advances or recedes, the decision avoids, modifies, or affirms the verdict.

It may be regarded as a proposition, containing a rule of universal application, and one *instar omnium*, that where an issue of fact is fully and fairly submitted upon its merits, and the jury, in the free exercise of a sound judgment, pass upon it, their verdict shall stand.<sup>(1)</sup> The converse of the proposition holds, that where the merits are not fully submitted, or are wholly overlooked, or but partially noticed by the jury, and they find manifestly against evidence, or the weight of evidence, or the equity of the case, justice requires that the verdict should not be permitted to stand.

The great difficulty that presents itself in every attempt to enforce these general positions, is, to sufficiently guard the province of the jury against encroachment, to leave them in possession of their rights uncontrolled, on questions of fact, and yet prevent the triumph of injustice. To accomplish this, and at the same time to extend relief, numerous distinctions have been taken, accompanied with decisions constituting the outlines of a practice, intended to govern the courts in all similar cases:

1. Where the case has never been fully submitted on its merits, or the verdict is bottomed upon a partial view of the testimony, and therefore clearly unjust, it will be set aside, and a new trial granted.

*D'Ayrolles v. Howard.*<sup>(2)</sup> Trespass by the lord of a manor against the commoner for spoiling his *peat*. Plea,

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(1) 2 Arch. Prac. 222. Gra. Prac. 514. (2) 3 Burr. 1385.

a justification under a right of common. Replication, *de injuria sua propria absque tali causa*. The principal question at the trial was, whether the plaintiff could, upon this issue, give in evidence that there was a sufficiency of common left. The judge was of opinion that on this issue he could not. The court now concurred in the same opinion. But, however, as it appeared that *the merits had never been fully tried*, they thought that the present verdict for the defendant should be set aside, and a new action brought by the commoner against the lord, in which all the matters insisted upon might be given in evidence; for both sides declared a desire to have the real merits fairly and fully tried.

So, *Rex v. Malden*.<sup>(1)</sup> Information in the nature of a *quo warranto*, to show by what authority the defendant claimed to be bailiff of Malden, and verdict against defendant. It was now moved to show cause why the verdict should not be set aside, and a new trial granted. There were in all five issues; but the two first were quite out of the case. The present question turned upon the third, fourth, and fifth issues; which were found for the prosecutor, by the judge's opinion; but were, at the trial, agreed to be subject to the opinion of this court, the judge giving the defendant leave to move for a new trial. It appeared that a majority of the aldermen and burgesses were present, and that the defendant was sworn into office before the presiding officer, and also before two others, who had no authority to swear him, and this became the chief point on the defendant's motion. This point was urged, on the ground that the swearing, which was not in the issue, had been put forth as the main issue, to the exclusion of the election of the defendant, which ought to have been the only issue; and upon this ground, that the true question

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(1) 4 Burr. 2135.



had never been submitted to the jury, a new trial was granted.(1)

So, in *Farrant v. Olmius*,(2) where the jury found arbitrary damages, instead of the increased rent, which was the measure of damages by agreement, and to which the evidence properly applied. It is true, the verdict was against law, but it was also against evidence; and both causes combining, although it was urged that the motion should be granted on payment of costs, the court made the rule absolute generally.

And in *Mumford v. Smith*.(3) Action on a policy of insurance, on the cargo of the sloop Mary, and claim for a total loss, and the jury rendered a verdict accordingly. The defendant moved for a new trial. The opinion of the court, delivered by *Livingston, J.*, sufficiently states the testimony at the trial—"It is conceded that the right to recover cannot exist, unless the vessel, at the time of sailing on the voyage insured, was seaworthy; that her not being so will affect, as well an innocent shipper of goods, as the owner of the vessel. This is certainly so, and however hard the law may bear on persons of this description, the underwriter is entitled to the full benefit of it, and ought not to be held to payment when this implied warranty has been violated. Whether such has been the case is principally a question of fact, and we would not willingly disturb a verdict given against an assurer of goods on a defence of this kind, where there had been a contrariety of testimony, or where the proofs were nearly *in equilibrio*; perhaps not, unless their decision was most manifestly against the whole of the evidence—such we think is the case here. No one who reads the testimony can hesitate in saying, that the breaking up of this voyage was not occasioned by

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(1) Vide 1 Monroe, 262. 4 Ibid. 480.

(2) 3 Barn. & Ald. 692. Supra, p. 331. (3) 1 Caines, 520.

any one of the perils insured against. The *Mary* must then either not have been seaworthy when she left New-York, or so far decayed as to require repairs at an intermediate stage of the voyage, which it was either impracticable to give her, or which would have cost more than she would, when repaired, have sold for. In either case, the defendant is not liable. Our opinion is, that this is a verdict palpably against evidence, which established, beyond a doubt, the innavigability of the vessel, and that a new trial must therefore be had.”(1)

In *Jackson v. Parker*.(2) A new trial was granted, as well because the verdict was against evidence as against law. It appeared that Parker, the elder, being in failing circumstances, transferred the property in question to the son, the defendant, for an alleged valid consideration ; and shortly thereafter the judgment creditor sold all the right, title, and interest, of the elder Parker in the premises, to the lessor of the plaintiff. The judge charged, and the jury found for the defendant. Motion for a new trial. The principal question urged was, that the assignment was fraudulent. It was admitted that question had been properly left to the jury. In answer to the motion, *Savage*, Ch. J., observes—“ Was the assignment fraudulent either in fact or in law ?—It has been decided that a failing debtor may prefer one creditor, or set of creditors, by an assignment of his property ; but if, in that assignment, a provision is made for the debtor or his family, the whole assignment is void.”(3) It is in evidence that both the *Parkers* knew of this debt and spoke of it, and of their determination that the creditors should not have the farm ; and as no other consideration is pretended but the support of

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(1) Vide *Trumbull v. Rivers*, 3 M'Cord, 132.

(2) 9 Cowen, 73. Supra, p. 335.

(3) *Mackie v. Cairns*, 5 Cowen, 547.

the family, it seems to me the assignment is fraudulent and void, as to creditors. If I am correct in this position, then the case is precisely within that of *Jackson v. Scott*,<sup>(1)</sup> and the plaintiff is entitled to recover. I am of opinion that a new trial be granted."

And in *Olmsted v. Miller*,<sup>(2)</sup> in error. Slander; verdict for plaintiff, and motion for a new trial, on the ground that the proof did not sustain the plaintiff's case, and the verdict was without, and contrary to, evidence. *Savage*, Ch. J., delivering the opinion of the court, after commenting on the proof introduced by the plaintiff in support of the words, proceeds—"These words, although they may be said to be equivalent to the charge, yet within the rule heretofore established, they are not the same in substance. The same remark is applicable to the other charges. The same idea is conveyed in the words charged and those proved; but they are not substantially the same words, though they contain substantially the same charge, but in different phraseology. The special damage shown, is probably sufficient.<sup>(3)</sup> The plaintiff was refused civil treatment at a public house, in consequence of the slanderous words spoken by defendant. She was also refused the hospitality and protection of a friend, in consequence of similar slanders; but that loss is not proved to have been the consequence of the words spoken by the defendant. On the whole, I am constrained to say, that the plaintiff in the court below did not prove the words laid in her declaration, and therefore ought not to have recovered." Judgment reversed, and a *venire de novo* awarded.<sup>(4)</sup>

And in *Lloyd v. Newell*.<sup>(5)</sup> Upon the first trial of this

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(1) 18 Johns. Rep. 94.

(2) 1 Wendell, 506.

(3) 1 Taunt. 39. 8 Term Rep. 130.

(4) Vide infra, "Slander," Chap. XIV. *Harker v. Reavis*, N. C. Law Rep. 276.

(5) 3 Halst. Rep. 298.

cause before Justice *Ford*, a verdict was rendered for the defendant, which afterwards, at the instance of the plaintiff, was set aside, and a new trial ordered. A second trial took place, and a verdict was found for the plaintiff. The defendant obtained a rule to show cause, why this verdict should not be set aside. The plaintiff claimed a balance due on a purchase, and his deed having the usual acknowledgment of payment of the consideration money, put on him the burden of proof to rebut the presumption raised by that receipt, in which it appears he entirely failed. Upon this point, the court were unanimous that the jury had drawn erroneous conclusions in point of fact from the proofs before them, and that the verdict was without evidence to sustain it. The verdict was set aside, and a new trial granted.(1)

So in *Commonwealth v. Malbone Briggs and wife*.(2) The defendants were jointly indicted for receiving stolen goods. The indictment set forth the record of a former conviction of Malbone of a similar offence, with the usual allegations of identity. Upon the trial the identity was not denied, nor was any evidence offered to prove it. No question was made to the jury upon the point. The jury returned a general verdict of guilty against Malbone, who moved for a new trial. One ground was, because there was no evidence of the identity of the Malbone Briggs, named in the former conviction, and the present defendant, to support the verdict. *Per Curiam*.—"Upon this point, it is said that the prisoner did not deny his identity with the person formerly convicted. But the plea of not guilty is a denial. No presumptions are to be made against the prisoner. The government must prove every essential allegation. It was the right of the prisoner to take advantage

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(1) Vide *Hudson v. Williamson*, 1 S. C. Con. Rep. 193.

(2) 5 Pick. 429.

of the omission on the part of the government. The attorney-general refers to the statute allowing, in some cases, an acquittal of part of the offence charged, and a conviction of the residue; but that is to be done by the jury. Here they have convicted of the whole charge. The court cannot separate the part improperly found, and punish for the residue.(1) Verdict set aside.

2. If the verdict be against the weight of evidence, especially if the justice and equity of the case is not with the verdict, it will be set aside. The distinction between a verdict against evidence, and against very weak evidence, must, in many instances, appear scarcely perceptible, and the granting of new trials in such cases entirely discretionary. It seems as if the several cases upon the subject warrant the conclusion, that the courts will grant a new trial where the verdict is manifestly against the weight of evidence, although some proof has been adduced on the other side, provided injustice seems to have been done by the verdict, and the cause is of sufficient value; as in *Corbett v. Brown*.(2) Action in deceit; plea, not guilty, and issue thereon. At the trial, before *Tindal*, Ch. J., it appeared that H. Brown applied to the plaintiffs for a supply of goods upon credit; and upon inquiry as to his circumstances, he stated that he had a capital of £300 to begin with. The plaintiffs were particular in their inquiries, and H. Brown referred to his father, (the defendant,) for the truth of this statement, who assured them the information given by his son was perfectly correct. In consequence of this, the plaintiffs trusted Henry Brown who shortly after became insolvent, with a deficit in the plaintiff's books of near £400. The £300 defendant had lent to H. Brown

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(1) Et vide *Sayer*, 264. 3 Wils. 38. 4 Conn. Rep. 426. 7 Halst. Rep. 153. 191. 2 Marsh. Kent. Rep. 195. 522. 6 Littell, 165. *Hardin's Kent. Rep.* 539.

(2) 8 Bingham, 33.

about three weeks before his letter to the plaintiffs, the defendant taking, at the time of the loan, H. Brown's promissory note for the amount, payable on demand, with interest at 5 per cent.; but the defendant declined to prove the £300 as a debt under his son's commission. The jury found for the defendant. A rule *nisi* was obtained, to set aside this verdict as contrary to the evidence, the plaintiffs having requested to know, whether the defendant's son had £300 capital of his own property, and the defendant having stated such to be the fact, when he knew his son had none but borrowed capital. *Tindal*, Ch. J.—“We think there ought to be a new trial in this case on payment of costs, the jury having drawn a conclusion from the defendant's letter, which it seems to the court its contents do not warrant.” *Alderson*, J.—“The question is whether, from the statements being false within the defendant's knowledge, the court must not infer fraud.” Rule absolute.(1)

So in *Kohne v. The Insurance Company of North America*.(2) Motion for a new trial, upon the ground that the verdict was against evidence, on a policy of insurance. It was contended, that the court having left it to the jury to say whether the trade was direct or not, and they having found that it was not, the court had precluded itself from interfering with their finding; and that jury trials must be done away, if the court shall undertake to set aside their verdict upon the ground that it was given against evidence. But by *Washington*, J., who delivered the opinion of the court—“I certainly shall always respect the opinion of the jury, so far as not to set aside their verdict in a doubtful case, because I might have drawn a conclusion different from what they have done. But if the verdict be plainly against evidence; or if in a case of great consequence, as

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(1) Vide *Means v. Moore*, 3 M'Cord, 282. *Mann v. Parker*, 2 Murphy, 262.

(2) 1 Wash. C. C. Rep. 123.

this certainly is, where some doubt might exist, as to the correctness of the conclusion drawn by the jury, it would seem right that the case should be more deliberately argued, and considered by another jury; it is certainly most consistent with the objects of justice to afford such an opportunity. I cannot conceive how the granting of a new trial can impair the benefits of a jury trial. If, by setting aside the verdict, the consequence would be a judgment contrary to it, the position would be correct; but this is not the case. 'The cause is merely re-heard before a new jury, when it may be more deliberately considered.' New trial awarded.(1)

And in *Hutchinson v. Coleman*.(2) Action on the case for flowing water back on the plaintiff's mill, and verdict for defendant. *Drake, J.*, after a minute recapitulation of the testimony—"This, in some cases, would not be sufficient to disturb a verdict. But in this case the controversy is important; there is much reason to believe that justice has not been done. The evidence is flatly contradictory on points where the truth is capable of being shown with certainty, which the parties on a second trial may be able to do, and which, on the first, they have not been prevented from doing by negligence, each having made a reasonable preparation for the trial; but each, no doubt, being disappointed in the adverse testimony, especially upon several points where the evidence is so contradictory that the witnesses, upon one side or the other, must have grossly mistaken or wilfully misrepresented the facts. Let the rule for a new trial be made absolute."

So in *Wallace v. Frazier*.(3) Assumpsit on a written warranty of the soundness of a negro. At the trial, the plaintiff's proof was conclusive. The jury found one cent

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(1) Et vide *Bowman v. Cox*, Peck's Tenn. Rep. 364.

(2) 5 Halst. Rep. 74.

(3) 2 Nott & M'Cord, 516.

for the plaintiff; and on motion for a new trial, on the ground it was a verdict substantially for the defendant, and clearly against evidence, *Nott*, J., delivered the opinion of the court, concluding—"The difference between the value of the negro, if sound, and his value in the situation which he was, became the rule by which the damages ought to have been estimated. The testimony on the point was clear and uncontradicted, and the jury were not authorized to disregard it, and adopt an arbitrary rule of their own, unsupported by any testimony. The verdict was clearly against evidence, and a new trial must be granted." (1)

Even hard actions form no exception to this rule, for if the verdict be manifestly against evidence and the justice of the case, the court will set it aside and grant a new trial.

It will be granted in *fraud*. Thus, in an *anonymous case*. (2) The underwriter had sued the defendant for an insurance fraudulently obtained. The cause had been tried, and a verdict found, by a special jury of merchants, for the defendant. The question turned principally on when the ship to be insured was to sail, whether it was in port or no at the time of the insurance procured, and whether the defendant knew of the loss when he wrote for an additional insurance. Motion for a new trial. Lord *Mansfield*—"It is very proper that all matters, especially of this nature, should be so conducted, that the party guilty of fraud may see they are not likely to gain by it. It is always by circumstance that fraud is discovered. And it is very remarkable here, that this gentleman insured in London, from *Poole* to *Newcastle*, £1000 only; and that, after the time when the account came to *Poole* of his ship being lost, he writes for a further insurance. It may be discovered, whether he did not actually read the paper which gives this

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(1) Et vide *Johnson v. Davenport*, 3 J. J. Marsh. Rep. 391. *Creel v. Bell*, 2 Ibid. 310.

(2) *Lofft*, 212.



account ; and when this letter was put into the post, which it was strange a man of business should send when no post went out, and without waiting for what news that or the next should bring, and that on the next day's intelligence, he did not correct his notice. Something too may be collected from any endorsing that may appear to have been made by the office, importing the time on which the letter went out. I remember a case at Poole, which turned on that only. I never have any difficulty in altering my opinion. At first, I thought the matter suspicious ; afterwards I doubted ; and am now returned to my former opinion." Rule made absolute for a new trial.(1)

So, in *quo warranto*. It was once doubted whether, under any circumstances, a new trial could be granted in a case in the nature of a *quo warranto*, where the verdict was against evidence. In *Rex v. Bennett*,(2) upon the trial of an information, in the nature of a *quo warranto*, for exercising the office of Mayor of *Shaftesbury*, the jury found a verdict for the defendant ; and upon a motion for a new trial, great doubts arose whether, after a verdict for the defendant, there could be any new trial, though the judge should certify (as he did in this case) that it was a verdict against evidence. After the point had been twice spoken to, it was adjourned, *propter difficultatem*, to be argued before all the judges of England. Afterwards, in the King's Bench, *Pratt*, Ch. J., declared—"That they had called in the assistance of the other judges, and that, upon the whole, they were equally divided ; so no rule for a new trial could be made."

But in *The King v. Francis*,(3) a verdict having been found for the defendant, in a *quo warranto* information, to show by what authority he claimed the office of

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(1) Vide *Harker v. Reaves*, N. C. Law Rep. 276. Ante, "Perverse Verdicts," p. 121.

(2) 1 Str. 101.

(3) 2 Term Rep. 484.

Alderman of Cambridge, a new trial was moved for, on the ground that the verdict had been given against the weight of evidence. It was objected, on showing cause, that no new trial could be granted in an information in the nature of a *quo warranto*: for which *The King v. Bennet* was cited. But the court granted a new trial, saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding; and that there were several instances, since the case in *Strange*, in which a new trial had been granted.

And in an aggravated case of *assault* and battery, where there was a nominal verdict for the plaintiff, but substantially for the defendant, as in *Bacot v. Keith*,<sup>(1)</sup> a case of a cruel and unprovoked assault on the part of the defendant, who had fired a gun at the plaintiff, loaded with buck-shot, which had nearly taken off an arm; and for this injury the jury had only given him one dollar damages. On a motion for a new trial, the judges were unanimously of opinion, that the jury in this case had behaved shamefully, and deserved the severest reprehension of the court for such glaring partiality and injustice. They observed, that although it was not usual to grant new trials on account of the smallness of damages, yet this was so extraordinary a case, in which every principle of justice had been outraged, that they could not hesitate a moment in ordering a new trial.

And in *slander*, *Johnson v. Scribner*.<sup>(2)</sup> Three witnesses for the plaintiff, in an action of slander, testified explicitly to the speaking of the words charged, in a ball-room where there was a dancing assembly, with the music of a violin, and where a *fracas*, with much confusion, took place, at or about the time referred to; and eleven witnesses for the defendant testified that they were in the room, and heard

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(1) 2 Bay, 466.

(2) 6 Conn. Rep. 185.

no such words as the plaintiff's witnesses had sworn to, and that, in their opinion, they should have heard them if they had been spoken ; and a verdict was found for the defendant. A new trial was granted, on the ground that the verdict was clearly against the weight of evidence.(1)

3. It is a general rule, that where, in weighing the testimony, on a motion to set aside the verdict as against evidence, they are satisfied the evidence on the side against which the evidence preponderates, was not fully before the jury, they will, for that cause, incline to grant a new trial, that the cause may be disposed of on its merits.

In *Norris v. Freeman*.(2) Debt on bond. Plea, general release. Replication *non est factum*, and joinder *inde*. A verdict was found for the defendant, and a new trial was moved for, upon an affidavit that very strong circumstances of forgery and perjury appeared upon the trial. The release produced by the defendant bore to be executed the 10th of October, 1768. One *Albert* and one *Goth* appeared to be subscribing witnesses. *Albert* was called by the defendant, but *Goth* was not. *Albert* swore that he saw the plaintiff seal and deliver the release, which was done about one o'clock that day, at the plaintiff's house, thirty miles distant from Worcester. Two respectable witnesses swore they had often seen the plaintiff write, and that his name subscribed to the release was not of his handwriting, as they believed, and that on the 10th and 11th of October, the plaintiff and the witnesses were at Worcester all day. A witness swore he heard the defendant say, he would let judgment go by default in this cause, and that he did not then pretend he had a release. In reply, the defendant called several witnesses, who swore the

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(1) Vide 7 Serg. & Rawle, 457. 2 Hayw. 224.

(2) 3 Wils. 38.

name subscribed to the release to be the plaintiff's handwriting. On cause being shown against a new trial, the court, without hearing the counsel for the plaintiff, were of opinion there ought to be a new trial. They said—"There are many cases where the court will grant new trials, notwithstanding there was evidence on both sides—as where *all the light* hath not been let in which might and ought to have been. We think the other subscribing witness *Goth*, ought to have been called and examined."

So in *Jackson v. Sternbergh*,<sup>(1)</sup> in ejectment. The plaintiff deduced a title to a certain piece or tract of land lying in *Schuyler's* patent, and which was known and distinguished by lot No. 156. The only inquiry on the trial was, whether the premises in question were comprised within the boundaries set out in the plaintiff's declaration. The jury found a verdict for the plaintiff, and the defendant moved for a new trial, on the ground of the verdict being against the weight of evidence. *Thompson, J.*—"The testimony is certainly very contradictory, but none of the witnesses appear to have been impeached. Their testimony, however, may make a very different impression when put on paper, from what it would to hear them examined. Judging only from the case, the weight of evidence is with the defendant. And although this of itself is not a sufficient ground for granting a new trial in all cases, yet from the whole that appears, there is well founded reason to believe justice has not been done; and that another examination of the cause ought to be made before the possession is changed. We are therefore of opinion that a new trial ought to be granted."

But if no additional light is to be expected, explanatory of the doubtful points of the testimony, and the evidence be sufficient to sustain the verdict, it will not be disturbed.

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(1) 1 Caines, 163.

*Camden v. Cowley*.(1) Motion for a new trial; the verdict being (as was suggested) contrary to the sense and meaning of the parties. But Lord *Mansfield*, Ch. J., stated to the court, that it was an action on a policy; that the ship in question was what is called a general ship, advertised at Lloyd's coffee-house as bound to the island of Jamaica, generally, and by the course of trade to touch at the several ports of the island, there to deliver some goods, and take in others; that it was insured at and from Jamaica, and warranted to depart with convoy. The policy was very inaccurately worded, in not defining what was meant by being at Jamaica, which he left to the jury, which was a very capable one. The inclination of his opinion was a contrary way; but his lordship thought the case was thoroughly tried, that no new light could be thrown on it, and therefore was against granting a new trial, which, if the verdict should be contradictory, must, in the end, produce a third; and the motion was denied.(2)

In *Lorat v. Parsons*.(3) Trover for a cask of indigo, which Allen, the assignor of the defendants, had ordered previous to his insolvency. The question was, whether, under the circumstances, the indigo was the property of Allen, or of the plaintiff, the vendor? The jury found a verdict for the plaintiff. On motion for a new trial, it was urged that it was Allen's, and ought to have been divided among his creditors, with his other property. Lord *Mansfield*—"Allen refuses to receive the indigo, and next objects to the shortness of credit. Subsequent to this, the defendants apply to Allen for an assignment of his effects for the benefit of all his creditors, and being apprized of the dispute relative to the indigo, request him to assign that among his other effects. This Allen positively refuses to do, saying he would sooner rob on the highway, for that

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(1) 1 W. Blacks. 418.

(2) Et vide 2 Blacks. 1221.

(3) 1 Cowp. 61.

he had never accepted it. After this declaration, the assignees, with full notice that it was not Allen's property, bribe the carrier to deliver the indigo to them, and now insist they are entitled to it, as claiming under Allen, though he has renounced all claim or right to it whatsoever. I really never saw a case so void of pretence or law."(1) Rule discharged.

So in *Collinson v. Larkins*.(2) Case for running foul of, and injuring plaintiffs' ship. The jury found a verdict for the plaintiffs. A new trial was moved for, on the ground that there was not sufficient evidence before the jury, to entitle the plaintiffs to recover. *Mansfield*, Ch. J.—"I should have no objection to the cause being tried again, if I thought any new light could be thrown upon it; and had I been on the jury, I should have made such allowances for the darkness of the night, that I should have found for the defendant, attributing the cause to mere accident, and a dark foggy night. There was some contradiction between the witnesses, as to the distance at which the ships first discovered each other and hailed. It was attempted to insinuate that the defendants tried to delude the plaintiffs by concealing the name of their ship; but this insinuation was afterwards done away." And *Per totam Curiam*; rule refused.(3)

So also in *Duff v. Budd*.(4) Case against a carrier for negligence. He had directions to deliver goods to one Parker, but while in the defendant's office, a stranger claimed them, paid the carriage, and took them away. The defendant submitted, in evidence, a notice exempting him from answering for the value of parcels more than £5 in value. *Dallas*, Ch. J., directed the jury to consider

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(1) Vide *Hankey v. Trotman*, 1 W. Blacks. 1.

(2) 3 Taunt. 1.

(3) Vide *State v. Fisher*, 2 Nott & M'Cord, 261. 2 Dallas, 55.

(4) 3 Brod. & Bing. 177.

whether, under the circumstances, the defendant had been guilty of gross negligence or not, explaining to them, that if the defendant and his servants had not taken the same care of the property, as a prudent man would have taken of his own, he had been guilty of gross negligence. The jury found a verdict for the plaintiff. A motion was now made to set the verdict aside, and for a new trial, on the ground that the verdict was against evidence." *Burrough, J.*—"Carriers are constantly endeavouring to narrow their responsibility, and to creep out of their duties, and I am not singular in thinking that their endeavours ought not to be favoured. The question here is, whether there was gross negligence. I think there was, and I am of opinion, that the case was properly left to the jury, and that they have given a proper verdict." (1)

So in a case of deceit, *Ward v. Center*. (2) The plaintiff declared against the defendant for having recommended one Brown to credit, as a solvent man, knowing him to be otherwise. Plea, the general issue. There was evidence on both sides, and the whole merits of the case exhausted. The chief justice charged the jury, that the only inquiry for them was, whether the defendant had fraudulently recommended Brown; that it was a question of fact, on which he should give no opinion, but leave it with them to decide. The jury found a verdict for the plaintiff. A motion was made by the defendant to set aside the verdict, as being against evidence. And, per *Van Ness, J.*—"This is an application for a new trial on a case made, and the only question now to be determined is, whether the court can deem the verdict so much against the weight of evidence, as to justify the setting it aside." After commenting on the evidence, the learned judge concludes thus:—"Upon the

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(1) Vide 2 Marsh. Kent. Rep. 195. 1 S. C. Con. Rep. 165.

(2) 3 Johns. Rep. 271.

whole, though with reluctance, I am of opinion, that it is not expedient to interfere with the verdict. The question of fraud has been fairly submitted to the jury, and they have found against the defendant. They had a right to do so; though I may wish that they had done otherwise."

And in *Walker v. Smith*.<sup>(1)</sup> The plaintiffs sued the defendant for the price of goods, consigned to him to sell. The defendant set up various grounds to excuse himself from paying more than he had actually received. The court in their charge to the jury expressly declared, that on the evidence, the plaintiffs were entitled to recover the full amount of the original debt, with such reasonable compensation for the delay of payment, as the jury should think proper. The jury, however, gave a verdict for only 468 dollars, 44 cents, which was the amount of the plaintiff's demand, estimating the sterling money at par, and after allowing the defendant a commission, and deducting the interest. The plaintiffs' counsel then moved for a new trial, because the verdict was against law, evidence, and the charge of the court; but after argument, the motion was overruled, and it was said, per *Washington, J.*, that although he was not satisfied with the verdict, nor should he have assented to it as a juror; yet the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent, on their part, any invasion of the judicial province of the court.<sup>(2)</sup>

So, in *Griffith v. Willing*.<sup>(3)</sup> Action in account against the defendants, as bailiffs and receivers. Plea, *ne unques bailiff or receiver*, and fully accounted. The chief justice charged the jury, that the plaintiff's claim rested upon the

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(1) 4 Dallas, 389.

(2) Vide *Commonwealth v. Eberle*, 3 Serg. & Rawle, 9.

(3) 3 Binney, 317.



principle of his being jointly interested with the defendants, and if he was right in that, of which they would judge, the action would be sustained. The jury found for the plaintiff; and now, upon motion for a new trial, as well upon the merits as upon the propriety of the action, *Tilghman*, Ch. J.—“The great point in dispute was matter of fact, viz. whether or not the plaintiff and the defendants had undivided interests in a quantity of hides, received by their agent at Buenos Ayres, and shipped, part to Philadelphia, in the defendants' ship *Canton*, and part to Bordeaux, in the plaintiff's ship *America*. This fact depended on a mass of testimony, written and parol, which it is unnecessary now to consider. I confess that neither at the trial, nor since, on further reflection, has it struck me in the same point of view in which it appeared to the jury. But that is not sufficient ground for awarding a new trial. I cannot clearly discern any principle of law which the jury have violated, nor will I undertake to say, that they have gone so decidedly against the evidence, as would justify the court in setting aside the verdict.”(1)

4. But the verdict will not be set aside as against evidence, where there has been evidence on both sides, and no rule of law violated, nor manifest injustice done, although there may appear to have been a *preponderance* of evidence against the verdict.

*Ashley v. Ashley*.(2) The judge who tried this cause, (which was upon a promissory note for £5000, which the defendant insisted was forged,) certified, that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff, but they found for the defendant. *Et per Curiam*—“As there was evidence on the part of the defendant, the jury are the proper judges which scale

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(1) Et vide, 3 Wash. C. C. Rep. 58.

(2) 2 Str. 1142.

preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial."

So, in an *Anonymous* case.(1) On a motion for a new trial, in an action by the owner of the inheritance for making a dam across an ancient water-course, the judge who tried the cause, certified that six witnesses were examined at the trial, on each side; that the jury found for the defendant, which was against his opinion; but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides. And a new trial was refused.

And in *Swain v. Hall*.(2) Covenant on a lease. The judge, in summing up to the jury, intimated that he thought the weight of evidence was with the plaintiff; but they found a verdict for the defendant. A new trial was moved for, and on showing cause, the chief justice made his report, stating there were two issues. He had laid the first entirely out of the case, as being clearly with the defendant. As to the second issue, he said the plaintiff called and examined three witnesses. And per *Wilmot*, Ch. J.—“Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge before whom the cause was tried, hath been of opinion that the strength and weight of evidence was against the verdict. In the present case, there was a contrariety of evidence on both sides; and although I am still of opinion that the weight of evidence was with the plaintiff, yet I disclaim any power to control the verdict of the jury, who are the legal constitutional judges of the fact.”(3)

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(1) 1 Wils. 22.

(2) 3 Wils. 45.

(3) Vide 2 S. C. Con. Rep. 431, 337. *Laval v. Cromwell*, Con. Rep. Tread. ed. 517.

So also in *Lewis v. Peake*.<sup>(1)</sup> Action on the warranty of a horse, and verdict for plaintiff. Motion for a new trial, upon the ground of the weight of evidence being against the verdict. *Gibbs*, Ch. J.—“This application stands on two grounds; as to the first, there is no doubt, on the defendant's own statement, but that there was evidence on both sides; it is like a case that was before us last term, tried before *Wood*, Baron, who said that if the verdict had been the other way, he should have been better satisfied; but we held that it was a question peculiarly fit for the consideration of a jury, and we refused to interfere.” Rule discharged.

And in *Hartwright v. Badham*.<sup>(2)</sup> Trespass *quare clausum fregit*. Plea, not guilty, and justification by right of way. The jury found for the plaintiff, negating the right of way. Motion for a new trial on various grounds, and among others, that the verdict was against evidence. Baron *Garrow* reported, that the whole case was left to the jury, who found for the plaintiff; that, according to his recollection, he had directed the jury to find according to the conclusion to be drawn from the evidence, as to whether the acts of user proved were referable to permission and indulgence or negligence, on the one hand, or to the exercise of an adverse right on the other. Per *Richards*, Lord Chief Baron—“The single question in this case is, whether we shall direct a new trial; and that question will depend on whether the verdict, which has been obtained, be supported by the evidence which was given on the trial or not. If it were not, we certainly ought to send the cause down to be tried again. There was much contradiction in the evidence given on both sides no doubt; but that must have been well considered by the jury, who were the most proper persons to decide

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(1) 7 Taunt. 153.

(2) 11 Price, 383.

between the parties in that respect, for it was their peculiar province to do so. And, *Per totam Curiam*—New trial refused.(1)

The principle of the rule is expressed with great clearness in *Carstairs v. Stein*.(2) Assumpsit for work and labour by the bankrupts before their bankruptcy. Plea, *non assumpsit*. The chief difficulty at the trial was occasioned by a charge of a commission of one half per cent., which was alleged to be usurious. Lord *Ellenborough*, Ch. J., directed the jury upon the evidence, that if the commission could be fairly set to the account of trouble and inconvenience, it was not usurious: otherwise, if the commission overstepped the *bona fide* trouble, and was mixed with an advance of money, as mere pretext, his lordship inclined to the conclusion that this commission was usurious, but left that question upon the evidence to the jury, who found for the plaintiffs. And on motion for a new trial, the court, per Lord *Ellenborough*, Ch. J., after commenting very fully upon the case, concludes—"These circumstances certainly laid a foundation for suspecting, that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required, but which were, in fact, required, and made from the beginning to the end of this business. But this, whether colour or not, was a question for the consideration of the jury; and to their consideration it was fully left, with a strong intimation from the judge, that the transaction was colourable, and the commission of course usurious. The jury have drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw; and they having done so, for the reasons already

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(1) Vide *Johnson v. Scribner*, 6 Conn. Rep. 185. 2 Miller's Louis. Rep. 12. 21. 449. 3 Ibid. 68.

(2) 4 Maule & Sel. 192. Supra, 345.

stated, we do not feel ourselves as a court of law, and acting according to the rules by which courts of law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

The principle, so fully illustrated in the above cases, has received the repeated sanction of the courts of this state. Thus in *Woodard v. Paine*.(1) Trespass against a justice of the peace, who had proceeded to trial, judgment, and execution, in a case in which he had no jurisdiction. The judge charged the jury that the plaintiff was entitled to recover, as the justice had no jurisdiction in the cause which he tried, and therefore his judgment was void, and all acting under it were trespassers; that if the jury believed that the justice had acted from ignorance merely, they ought to give such damages only, as would compensate the plaintiff for the actual loss that he had sustained. The jury found a verdict for the plaintiff, for two hundred and seventy dollars, which was about the value of the property in question. Motion for a new trial, and the ground was, the verdict was against evidence. *Per Curiam*—"From the nature of the cause, and the testimony that was given, there was room for an honest difference of opinion as to the conduct of the defendants, and as to the damages sustained by the plaintiff. We are inclined to think that the better conclusion is, that the magistrate acted under an honest, and real impression, that he had jurisdiction of the case before him.—It was fairly submitted to the jury; and we cannot say that they have so much erred as to warrant us in interfering, and setting aside the verdict."(2)

So in *Ackley v. Kellogg*.(3) Case against the defendants as common carriers. The judge charged the jury, that the defendants were common carriers as far as Troy, where

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(1) 15 Johns. Rep. 493.

(2) Vide 3 Johns. Rep. 271.

(3) 8 Cowen, 223.

that character ceased, and they became mere storers or forwarders; that the only question was, whether they had pursued the plaintiff's instruction; as to which the question was one of fact upon contradictory evidence, and of which the jury were the judges. Verdict for the defendants. A motion was made, on behalf of the plaintiffs, for a new trial, upon several grounds; and among others, that the verdict was against the weight of evidence. *Sutherland, J.*—"There was much testimony on both sides. The captain of the defendant's sloop, which carried the goods to Troy, swears positively, that one of the plaintiffs, after the goods were put on board at New-York, came on board the vessel, and directed him to forward the goods immediately on his arrival at Troy.—The testimony of this witness was probably decisive with the jury, especially as the evidence on the other side was either of a negative or circumstantial character. We cannot, within the established principles which regulate the discretion of the court, interfere with this verdict, as being against the weight of evidence."

And in *Douglas v. Tousey*.<sup>(1)</sup> Slander, and verdict for the plaintiff \$500. The defendant moved for a new trial, and one ground on which he mainly relied, was the verdict's being against the weight of evidence. Upon this point the court observed—"It is said the verdict is against the weight of evidence. The evidence presented in the case seems to be in favour of the defendant; but whether it is so manifestly against the finding of the jury as to call on this court to grant a new trial, is a matter of some doubt. There was contradictory evidence as to the words spoken. This devolved upon the jury the duty of reconciling the conflicting testimony, and in case that could not be done, of deciding upon the credibility of the witnesses. Their

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(1) 2 Wendell, 352.

decision was upon a matter peculiarly within their province, and the court ought not to review and reverse it."

So, also, in *Smith v. Hicks*.<sup>(1)</sup> Action in assumpsit, for money had and received. The plaintiff had a verdict. The defendant moved for a new trial. One ground was, that the verdict was against evidence. After recapitulating the testimony, and disposing of the other objections, the court observe—"To set aside a verdict, as contrary to evidence, there should be a decided preponderance against the verdict; but there is no such preponderance in the case. For the defendant, Imlay and Griswold testified. Griswold had testified differently before the first judge, on his own application for a discharge; and it appears from the report in the case,<sup>(2)</sup> that he testified differently on the former trial. There is, then, only the oath of Imlay against that of the defendant. There is, therefore, no preponderance, and a new trial should be denied."

A still stronger case presents itself in *Fowler v. The Etna Fire Insurance Company*.<sup>(3)</sup> Action in assumpsit, on a policy of insurance. The chief question at the trial was, whether the house that was burnt down was a frame house, filled in with brick. The judge charged, that it was competent for the plaintiffs to have established a usage, and to have shown the meaning of the words, "a frame house filled in with brick," as between assured and insurer, and it was for them to say, how far the evidence went to establish such usage. The jury found a verdict for the plaintiff, and the defendants moved to set it aside. Two new trials had been granted, the first for the misdirection of the judge, and the second because the verdict was against evidence. *Sutherland, J.*—"It was undoubtedly competent for the plaintiffs to show that the words, "a

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(1) 5 Wendell, 48.

(2) 2 Wendell, 202.

(3) 7 Wendell, 270.

frame house filled in with brick," had, by the custom or usage of insurers and insured, acquired a particular technical meaning, different from that which the words might be generally understood to import.—But the difficulty in this case is, that the evidence to establish such usage is entirely defective, while the charge of the judge was perhaps calculated to make an impression upon the jury, that there was competent and sufficient evidence of such usage.—I still think the verdict on this point is against the weight of evidence; but after two concurring verdicts, in a case where there were many witnesses, and a great deal of testimony on both sides, upon a mere question of fact, (supposing there was no misdirection,) I should not think it a discreet exercise of the power of this court, again to interfere with the finding of the jury."(1)

So, in *Hammond v. Wadhams*.(2) Writ of entry. General issue. Joinder, and verdict for the tenant. The demandant moved for a new trial, on the ground that the verdict was against evidence. *By the Court*, after noticing the evidence—"In this view of the subject, we do not feel ourselves authorized to deprive the tenant of his verdict, and to send the cause to another jury for trial. There was evidence on both sides; the credit of the witnesses can be weighed only by a jury. It must be presumed that they gave due weight to their testimony. We may, and we ought, to grant a new trial, when the verdict is against the evidence, or when it is manifestly against the weight of the evidence. In such cases, the facts ought to be inquired into by another jury. Whatever may be the inclination of our opinions, as to the conclusions the jury have made from the testimony, it is their province, and not ours, to make those conclusions; and we cannot say that

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(1) Vide *Reid v. Landford*, 3 J. J. Marsh. 421.

(2) 5 Mass. Rep. 353.



this verdict was given against evidence, or against the weight of evidence. It must therefore stand."

And in *Baker v. Briggs*.<sup>(1)</sup> Assumpsit on a promissory note. One of the counts was against him as maker. The defendant had endorsed it, but not as payee. The question was, whether he was held by his endorsement, as an original promiser or maker, and being in the nature of a surety, he was not entitled to all the rights, by way of defence, of the acknowledged maker of the note. The jury having found a verdict for the defendant, the plaintiff moved for a new trial on account of misdirection, and because the verdict was against evidence. *Parker*, Ch. J., delivered the opinion of the court—"It is moved to set aside this verdict on the ground that it is against evidence, notwithstanding there was a great deal of evidence on both sides so contradictory, that on a former trial the jury could not agree, and on this trial it was the subject of elaborate argument, and scrupulous comparison of testimony. If, under these circumstances, a verdict can be set aside as against evidence, no action can be tried which may not be brought in review before the court upon the facts, and the trial by jury will be virtually superseded. Perhaps no cause, which really has two sides to it, can be determined without a serious belief in the party losing, and perhaps in his counsel, that the verdict was wrong, and against the weight of evidence." New trial refused.<sup>(2)</sup>

5. A rule closely allied to the preceding, is, that a new trial will not be granted on technical or *doubtful* grounds, especially in unimportant cases, if there be sufficient evidence on the merits to support the finding of the jury, who are in all such cases the sole constitutional judges.

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(1) 8 Pick. 122.

(2) Et vide 3 Call, 276.

Thus, in an *Anonymous* case,(1) on the warranty of a horse. The court did not choose to grant a new trial, though the judge who had presided at the trial expressed himself rather inclined to the side of the plaintiff, and the jury had found for the defendant. Lord *Mansfield* said, the courts were usually enough troubled at the first trial in such matters; that it was neither clear enough, nor important enough, to answer a second trial.—“It does not follow in every case, where the weight of evidence may seem rather against the verdict, that a new trial should be ordered. The plaintiff asks, that he may be at the expense of £20, at least, for the chance of twenty, which is the whole value of the horse. *Uncertain justice by a verdict is much better than certain injustice*; which latter, I think, would follow by granting a new trial.”

And in another *Anonymous* case.(2) On a motion for a new trial, upon the ground that the jury found expressly against evidence. It was an action of trespass, breaking into the plaintiff's shop, where his goods were at auction, damaging his goods and obstructing the sale. No damages were proved. Lord *Mansfield* said he left it to the jury upon the damages on the trial. They found for the defendant. He declared himself not dissatisfied, and said he thought they ought to waive their motion; for if they went to it again, they might probably recover sixpence, which would be all they could deserve.

In another case,(3) where a verdict had been found against evidence, but according to the merits. The court said they would not grant a new trial, where the jury have found according to the justice of the case, though they may have found against the form, and may have been wrong in so doing.—“When the substantial justice appears to have been answered, the court will not suffer the chance

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(1) *Lofft*, 146.

(2) *Ibid.* 391.

(3) *Ibid.* 521.

of its being defeated, nor the parties to be turned round to a second trial, when the merits have been decided."

And in *Smith v. Huggins*,<sup>(1)</sup> the same rule as in *Ashley v. Ashley*<sup>(2)</sup> was laid down, that the jury are the proper judges, which scale preponderates; and a new trial was denied, though there was but weak evidence for the plaintiff, and the chief justice had summed it up strongly for the defendant.

In *Smith v. Parkhurst*,<sup>(3)</sup> upon a trial at bar in ejectment, the parties agreed to a special verdict, as to a point of law arising upon a family settlement. But there being a question of fact, in which they did not agree, that was left to the jury, who found it for the plaintiff, against the weight of the evidence. The defendant moved for a new trial, and several objections were made, which were disregarded by the court. But the main point on which the new trial was denied, was because the evidence was doubtful.

So in *Francis v. Baker*.<sup>(4)</sup> Pratt, Ch. J., before whom the cause was tried, after reporting the evidence specially, said, that if he had been upon the jury, and had known no more of the witnesses than he did when this cause was tried, he should have thought the verdict ought to have been for the defendant; but where there was a contrariety of evidence as to the principal matter in issue, and the characters of the witnesses on both sides stood unimpeached, the weight of evidence did not depend altogether upon the number of witnesses; for it was the province of the jury, who might know them all, to determine which witness they would give credit to, and no judge had a right to blame a jury for exercising their power of determining in such a case. Clive, J.—"The granting of a new trial in this case, would be taking away that power, which is by

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(1) 2 Str. 1142.

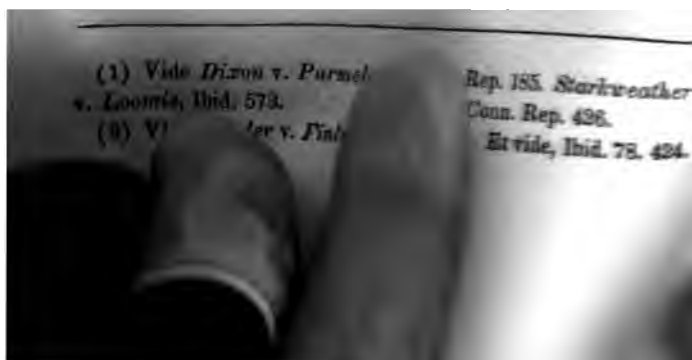
(3) 2 Str. 1195.

(2) Supra p. 380.

(4) 6 Bacon Ab. 664.

the constitution vested in the jury." *Bathurst, J.*—"As there was, in this case, strong evidence for the plaintiff, a new trial ought not to be granted: although the weight of evidence was, in my lord chief justice's opinion, with the defendant." And per *Gould, J.*—"It is difficult to draw a line as to the granting of a new trial: and perhaps the granting or not granting of it must always depend upon the circumstances of the case." And *Per curiam Curiam*—rule discharged. 1

*Palmer v. Hyde.* 2 Action on assumpsit. The defendant claimed that he had paid the sum of seventy dollars. The plaintiff admitted that the defendant had paid him that sum, but denied that it was paid as claimed on the contract in question. Witnesses were called by both the parties, in support of their respective claims, and on their testimony, the jury gave a verdict for the plaintiff, disallowing the payment claimed by the defendant. The judge, thinking the preponderance of evidence to be the other way, returned the jury to a second and third consideration, but they adhered to their verdict. On motion of the defendant, the judge then stated the evidence upon the point in question, expressing his opinion thereon in opposition to the verdict. *Hosmer, Ch. J.*—"The granting of a new trial, merely because, in the opinion of the court, the verdict is rather against the weight of evidence, would reduce the trial by jury to an expensive and useless form, and take away the power vested in the jurors by the constitution. The verdict ought to be manifestly and palpably against the weight of evidence, to authorize a *revere facias de novo*, and this is the law of Westminster Hall." The other judges concurred, and a new trial was refused. 3)



So, in *Wait v. M'Neil*.<sup>(1)</sup> Assumpsit for goods sold. On the trial, before *Parker, J.*, the plaintiff proved a delivery, and a regular charge in his books, as of goods sold in the usual course of business. The defence was, that the parties had engaged as partners in the manufacture of certain carriage boxes; in which business the plaintiff was to advance all the stock, and the defendant to pay for all the labour; and the boxes, when made, to be sold by the plaintiff, on their joint account. The jury found for the plaintiff, and the defendant moved for a new trial, as upon a verdict against evidence. *Sedgwick, J.*—"The objection in this case is, that the verdict is against evidence; and if it be clearly and manifestly so, it certainly ought to be set aside. The plaintiff, at the trial, having proved his case, the only positive evidence against him, was the testimony of the defendant's son. The court will pay all due respect to the testimony of a witness who stands uncontradicted and unimpeached; but the credit of every witness must be taken into the consideration of the jury; and this is peculiarly and emphatically within their province.—As the burden of proof, respecting the partnership, was on the defendant; if the jury did not pay full credit to young M'Neil's testimony, they did right in the verdict which they returned. On the whole, we are all of opinion that we cannot say that this verdict was so against evidence that it ought to be set aside."<sup>(2)</sup>

*De Foncleare v. Shottenkirk*.<sup>(3)</sup> Assumpsit. The plaintiff counted on the agreement to take a negro on trial, and if the negro did not like him, he was to be returned; and also for his price. The negro in the meantime had ran away. The judge charged the jury in substance, that if from the

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(1) 7 Mass. Rep. 261.

(2) Vide *Buck v. Waddell*, 1 Ham. Ohio Rep. 357.

(3) 3 Johns. Rep. 170.

evidence they should be satisfied the sale of the negro was absolute, the plaintiff would be entitled to their verdict; but if it was a sale upon trial, then while the slave remained in possession of the defendant, he was bound to take as good care of him as he would of his own slave, and if he had not done so, the plaintiff was entitled to a verdict, otherwise not. The jury found for the plaintiff. A motion was made to set the verdict aside, and one ground taken was, that it was against evidence. The court, per *Spencer, J.*—“The negro was in the possession of the defendant, but whether as being sold to him, or put into his possession until he should signify his assent to buy, or return him, will depend on the facts of the case.—The plaintiff rests on circumstances, from which to infer the fact; these the defendant has rebutted, by circumstances and by positive proof of the acknowledgment of the plaintiff, that the negro was his when he ran away. I cannot see that the jury have decided against the weight of the evidence by finding for the defendant, and I am therefore unwilling to disturb the verdict.”(1)

So in *Jackson v. Douglas*,(2) In ejectment. There was some ambiguity in the testimony, as to the boundary line. The jury, under the direction of the judge, found a verdict for the plaintiff. A motion was made to set aside the verdict, which was submitted to the court without argument. *Per Curiam.*—“There is not a sufficient cause for interfering with the verdict. There was no uncertainty originally as to the true location of the lots. It is very clear that the defendant possesses beyond the true line, and the single fact, that one of the lessors of the plaintiff, about eight years ago, showed a mistaken line as the true line, is

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(1) Vide *Cam. & Norwood*, 104. 1 *Hayw.* 14. 132.

(2) 8 *Johns. Rep.* 367.

not sufficient of itself to conclude him in this case. The motion is therefore denied.”(1)

In all these cases, the proof fluctuated from doubt to certainty, but the credibility of evidence being universally conceded to the jury, the court will not interfere, unless in manifest cases of abuse, or when their own province of law is invaded by the jury. This appears to be the true boundary line, tending to preserve something like order and consistency in the mass of apparently conflicting decisions. The rule is peculiarly applicable to that class of cases usually designated “hard actions.” Here the power of the jury is left almost uncircumscribed. The court will extend every fair presumption in aid of their verdicts. For example, in *slander*.

The jury found that words, directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict was recorded for the defendant. The court would not grant a new trial, on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had accidentally been the cause of his brother's death.(2)

And in *Harding v. Brooks*,(3) in slander, charging the plaintiff with being a liar, a knave, and a rascal. The defendant admitted the speaking of the words, and filed several pleas in justification. At the trial before *Wilde, J.*, it was admitted that the plaintiff was a clergyman, and the trial proceeded upon the pleas in justification. Questions were reserved for the court on all the pleas except the tenth, and this went to the jury, who found for the plaintiff. The defendant moved for a new trial, on the ground that the verdict was against evidence. *Parker, Ch. J.*—“The evi-

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(1) Vide *Gist v. Lybrand*, 3 Ham. Ohio Rep. 307. *McKie v. Garlington*, 3 McCloud, 276. *Howard v. Aikin*, Ibid. 467.

(2) 2 Price, 282.

(3) 5 Pick. 244.

dence to support this plea is found in the testimony of Clark Thompson, who states that the plaintiff said 'he had ascertained that the person who signed the letter was not entitled to M. D., and if so, he was nothing better than a quack.'—The words testified to on the trial varied from those inserted in the plea, which probably had been taken from his relation at a former period. A trifling variance in the expression from the form of words testified by the witness, would have rendered them wholly inapt to prove the issue. The lie consists in the plaintiff's having said, that he had ascertained that Mr. Smith was not entitled to the distinction of M. D.—Now we do not think it was an illegal stretch of charity in the jury to doubt, in behalf of a minister of the gospel of good character, of his having lied, when the witness by whom the lie was to be proved intimated doubts of his own correctness, as to the words used, and when the exactness, and even the collocation of the words, might be important to settle their bearing upon the point in issue. We are therefore of opinion, that judgment must be rendered on the verdict."

So in *Paddock v. Salisbury*.<sup>(1)</sup> The defendant had charged the plaintiff with arson and larceny. Plea, the general issue. The words were fully proved. The jury found a verdict for the defendant, and on motion for a new trial, it was urged the verdict was against evidence. *Sutherland, J.*—"As to the verdict of the jury, we cannot disturb it."<sup>(2)</sup> There was no misdirection of the judge, or any rule of law violated, and the general rule is undoubtedly as stated by Mr. Justice *Spencer*, in *Jarvis v. Hathaway*,<sup>(3)</sup> that in penal actions, and in actions for a libel or defamation, and other actions vindictive in their nature, unless some rule of law be violated in the admission or

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(1) 2 Cowen, 811.

(2) Vide *Dexter v. Taber*, 12 Johns. Rep. 239.

(3) 3 Johns. Rep. 180.



rejection of evidence, or in the exposition of the law to the jury, the court will not give a second chance of success.”(1)

So, in an action for *malicious prosecution*, *Norris v. Tyler*.(2) The defendant had preferred a bill of indictment against the plaintiff, for forging a note of hand. Four witnesses were called, to prove that the handwriting was not the plaintiff's, and the judge directed the jury in his favour. But the jury found a verdict for the defendant. Upon a motion for a rule to show cause why the verdict should not be set aside, as being a verdict against evidence, and why a new trial should not be granted, the court said, the defendant had been sufficiently tried once, where the suit was of a criminal nature, and motion denied.

So, in a case of *usury*, *Brook qui tam v. Middleton*.(3) The jury having found a verdict for the defendant, in an action for usury, *Garrow* moved for a new trial, with respect to one of the counts, as being a verdict against all the evidence. The usury consisted in taking a quarter *per cent.* upon the loan, in the name of commission, the lender having nothing to do for it but to receive the money at the appointed time of repayment. Lord *Ellenborough* referred to the case of *Fonnereau v. Bennet*,(4) where the court said that the rule had been laid down for fifty years past, not to grant new trials, in actions on penal laws, where the verdict was for the defendant. There, indeed, the doctrine was laid down rather too generally, as the court would certainly grant a new trial in case of the misdirection of the judge in point of law. But in case of a verdict against evidence, the rule was now settled, that no new trial would be granted.(5)

So, in *Baker v. Richardson*. Debt for a violation of

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(1) Et vide 7 Cowen, 613. 10 Wendell 119. (2) 1 Cowp. 37.

(3) 10 East, 268. (4) 3 Wils. 59.

(5) Vide *The King v. Mawbey*, 6 Term Rep. 619, and *Wilson v. Rastall*, 4 Term Rep. 753.

the statute, in selling whiskey without license, and verdict and judgment for defendant. And on certiorari, *Per Curiam*.—"The only question was, whether these transactions were fair, or intended as mere evasions of the statute. Whether the verdict was such as we should have given, is not the point of inquiry. The question belonged to the jury, who have decided in favour of the defendant, and the court will not, in such a case, set aside the verdict." (1)

And in *Comfort v. Thompson*. (2) Debt on statute to prevent injury by dogs, and verdict for defendant, and on certiorari, *Per Curiam*.—"The verdict is no doubt clearly against evidence; but this being an action for a penalty, there is no new trial granted in such cases, on the ground of the verdict being contrary to evidence, provided the verdict be for the defendant, and there be no irregularity in the case. (3) There is at least as strong reason for applying this rule to such trials in justice's courts, as in any other."

So, if the action be *vexatious*. *Macrow v. Hull*. (4) The defendant's counsel showed cause against the court's granting a new trial; which had been moved for by the plaintiff's counsel, upon the foot of the verdict's being against evidence. Mr. Justice *Foster*, who tried the cause, reported it to be an action of trespass, extremely frivolous, but sufficiently proved. He said that the defence was a very strong one indeed in mitigation of damages; but yet was not a sufficient denial of the trespass: so that, in strictness, the verdict was undoubtedly against evidence. However, he thought the action so frivolous and vexatious, that he should have thought sixpence damages to have been enough. Whereupon the court held, that notwithstanding its being a verdict against evidence, yet they ought to refuse, and accordingly did refuse, to set aside the verdict.

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(1) 1 Cowen, 77.

(2) 10 Johns. Rep. 101.

(3) Vide *Mattison v. Allanson*, 2 Sur. 1238.

(4) 1 Burr. 11.

So also for a *nuisance*. *The King v. Mann*.<sup>(1)</sup> The defendant was acquitted upon not guilty to an indictment for a nuisance, in continuing a hut erected upon the highway. And now *Blosset*, serjeant, moved on behalf of the crown, for a new trial, on the ground that the verdict was against evidence. *Dampier*, J.—“In penal actions, where the verdict is for the defendant, the court, I believe, do not grant a new trial, except for a misdirection of the judge.” And, *Per Curiam*—rule refused.

6. In disposing of motions to set aside verdicts and grant new trials, on the ground of the verdict's being against the weight of evidence, the court will look into the merits, and will not grant the motion, *against the equity of the case*.

The cases of the *Dutchess of Mazarine* and of *Cox v. Kitchin*, already cited, illustrate the rule. These cases, however, as well as others adduced above, showing how strongly the courts are inclined to overlook all objections, where justice is done, rather apply to verdicts against law than evidence. But for that reason they more strongly enforce the rule.<sup>(2)</sup>

In *Wilkinson v. Payne*,<sup>(3)</sup> which may be regarded as the leading case on the subject of new trials, where verdicts are clearly against evidence—the jury were permitted to indulge in a presumption not only without, but against evidence, on the side of conscience and equity. This was an action on a promissory note for £180, given to the plaintiff by the defendant, in consideration of the plaintiff's marrying his daughter. The defence set up was, that though there was a marriage in fact, it was not a legal one. The whole defence was put on strictly technical grounds, against the conscience of the case. On the denial of the

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(1) 4 Maule & Sel. 337.

(2) 2 Salk. 646. 1 Bos. & Pul. 333. Supra, 303. 341.

(3) 4 Term Rep. 468. Supra, 344.

motion for a new trial, the court, after seizing upon every circumstance in aid of the verdict, conclude—"In this case the parties did not intend to elude the marriage act; but all their friends were fully informed of, and concurred in the former marriage: and we should ill exercise the discretion vested in the court, if after the jury had presumed a subsequent legal marriage, under all the circumstances of this case, we were to set aside their verdict."

And in *De Tastet v. Baring*.(1) Action on two bills of exchange. The only question to settle at the trial was, whether the plaintiffs were entitled to re-exchange. It was tried by a special jury, who found for the defendants. Upon motion for a new trial, on the ground that the verdict was against evidence, Lord *Ellenborough*, Ch. J., delivered the opinion, that the rule for a new trial should be discharged, on the ground that the question was properly put to the jury, to allow the plaintiff damages or expenses in the name of re-exchange, if the plaintiffs were either liable to pay, or had paid, re-exchange on these bills. And that, as it did not appear to have been clearly made out, that there was at the time any course of re-exchange between *Lisbon* and *London*, the court must presume that the jury, which was one particularly conversant in subjects of this sort, found for the defendant on that ground. And the rule was discharged.

So, in an action for use and occupation, where the plaintiff sued under circumstances of hardship, and the testimony for the defendant was scarcely sufficient to raise a presumption. *Woodcock v. Nuth*.(2) The judge having left it to the jury, to say whether the plaintiff had accepted one *Lewis* as his tenant, a verdict was found for the defendant, which the plaintiff moved to set aside. It appeared the premises in question were originally let to *Nuth*, and at

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(1) 11 East, 265.

(2) 8 Bingham, 170.

midsummer-day, 1829, precisely a quarter after his term had expired, he paid a quarter's rent, deducting £10 for certain repairs; that this was the only time he had been seen on the premises since the term expired; that the rent had never since been paid upon the precise quarter day; and that all the subsequent payments had been made by *Lewis*. The court observed, upon this state of facts, they could not say there was not evidence to go to a jury; that *Lewis* was really the tenant, and therefore refused the rule.

So in *Campbell v. Spencer*,<sup>(1)</sup> in ejectment. The plaintiff had bartered a store of goods for a farm one morning, while drinking bitters at a tavern. The contract was marked by acts of indiscretion on the part of the defendant, but with no positive evidence of such fraud on the part of the plaintiff as would avoid it. The judge told the jury that there was nothing in the evidence, which would authorize the court to say that the contract was void, however indiscreet it might have been on the part of the defendant; but the evidence was for their consideration. The jury found a verdict for the defendant, which, upon a motion for a new trial, was set aside; and from this decision, the defendant appealed. *Tilghman*, Ch. J.—“It is said by the plaintiff's counsel, that the jury undertook to pronounce the contract altogether void. If that was ascertained on the record, and the case could be reduced to that point, I should have no hesitation in saying, that there should be a new trial; but this is impossible. We cannot say on what point the verdict was founded. Suppose, now, the jury were of opinion, that the contract was so far binding as to make the defendant answerable in an action for damages, but that it was not a case in which the plaintiff was entitled to a specific performance; I then ask myself whether I am clear, that on this ground the jury were wrong. I have thought

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(1) 2 Binn. Rep. 129.

a good deal of it, and I cannot say that I am. It is one of those cases in which I would not interfere with the verdict.”(1)

And for a similar reason, the court will not grant a new trial, where they see plainly the result must be the same ; as in *High v. Wilson*.(2) An action in trespass against the sheriff, for taking and carrying away the goods of the plaintiff. The defendant justified under the execution, but at the trial omitted to produce the judgment, on which the execution was issued. The jury found a verdict for the defendant, and the plaintiff moved to set it aside, on the ground of defect of evidence. *Per Curiam*.—“The defendant, in this case, did not produce the judgment at the trial. But we are all clearly of opinion, that the plaintiff had no right of action, for the sale of the horse was evidently fraudulent. On the authority of the case of *Martyn v. Podger*,(3) there appears to be no use or justice in granting a new trial, when the plaintiff is not entitled to recover. For that reason the rule is refused.”

And in *Pangburn v. Bull*,(4) already cited. The court held, that if, on a review of the case, it shall appear that, from the facts not disputed at the trial, there was evidently a want of probable cause, the verdict ought not to be set aside, if they see that the jury have not erred in point of law, although the charge was erroneous, no injury having therefore been done to the defendant below, of which he had a right to complain.

7. If the case be frivolous in itself, and attended with unimportant results, the verdict, although contrary to the weight of evidence, and even to the charge of the judge, will not be set aside, and a new trial granted.(5)

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(1) Vide 1 Brayton's Verm. Rep. 170. (2) 2 Johns. Rep. 46.

(3) 5 Burr. 2631. (4) 1 Wendell, 345. *Supra*, p. 295.

(5) Vide *supra*, p. 347.

*Anonymous* case.(1) Action in covenant. Defendant replied *non fregit conventionem*. The question turned upon repairs; and it appearing in evidence, that there were thirty-eight years to run on premises, out of a term of forty, the jury thought the injury was rather to the possession than to the landlord. They found for the defendant, whereupon the plaintiff moved for a new trial. At the trial it appeared notice had been given to the tenant to repair. And it further appeared, lead had been stolen off the house, and the tiles to come at it. But the damage had been repaired in a great measure; and the jury said they believed there was not above a shilling damages, upon what was left unrepaired. Mr. Justice *Aston* said, upon so small an occasion they would not, and the court never was used, to grant a new trial.(2)

So in *Roberts v. Karr*.(3) Action of trespass, for breaking and entering the plaintiff's close, destroying his fence and two plants of ivy there growing, and for an injury done to a wall, by inserting rafters into it. The defendant pleaded several pleas, including a right of way. Lord *Ellenborough*, Ch. J., who presided at the trial, directed the jury that the plaintiff was entitled to a verdict upon the last count of the declaration, upon the evidence given by one witness, who gave his opinion that the wall was damaged to the amount of four or five pounds. The jury found for the plaintiff on some issues, and for the defendant on others. Both moved for a new trial, on the ground of issues found being against the weight of evidence. *Mansfield*, Ch. J.—“The judge who tried the cause has intimated an opinion, though not very strongly, in favour of the plaintiff, but he rested it chiefly on the other issue, on which there was evidence of the plaintiff's wall having been damaged

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(1) *Lofft*, 529.

(2) *Et vide* 2 *Blacks.* 851.

(3) 1 *Taunt.* 495.

to the amount of five pounds. But as to that issue the court will not grant a new trial for so trifling a sum as five pounds.

And in *Brown v. Ray*.<sup>(1)</sup> Action of replevin for taking the plaintiff's cattle. The defendant avowed they were in his close unlawfully, and that he took them under a distress, damage feasant. Plea in bar, that they escaped into the defendant's close, through a defect of a fence, which the defendant ought to have repaired. The jury found a verdict for the plaintiff. Damages, four guineas. A rule *nisi* was applied for, on the ground that the verdict was against the weight of evidence. Lord Chief Justice *Best*.—"If we were to grant a new trial, it is quite clear, it must be on the terms of the payment of costs by the defendant, and he might eventually be put to the expense of £50, to get rid of the trifling sum of four guineas, for which the plaintiff has obtained a verdict. Although the rule that the court will not grant a new trial, on account of trifling damages, may not extend to an action of replevin, still it appears to me to be so far salutary, as not to be entrenched on in the present instance, or induce us to disturb the verdict."<sup>(2)</sup>

So in *Hunt v. Burrel*, and others.<sup>(3)</sup> Action in trespass, *quare clausum fregit*. The defendants justified at the trial, by virtue of an execution against the plaintiff. One of them acted as the deputy of the under-sheriff, and upon offering the deputation in proof, it was overruled by the judge as a justification, but permitted in mitigation. The jury found a verdict for the plaintiff of \$5 damages. The question, whether the deputation ought to have been received, was submitted without argument. The court

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(1) 9 Moore, 583.

(2) Vide 2 Verm. Rep. 185. Brayton's Verm. Rep. 170.

(3) 5 Johns. Rep. 137.



held that it was competent testimony, but denied a new trial, concluding thus:—"But, though the evidence ought to have been received, this case will not justify a new trial. As the plaintiff recovered but five dollars, he must pay full costs to the defendants, as no certificate of the judge has been given, and as the title did not in any wise come in question. It certainly, then, would not be fit to award a new trial, and create all that additional expense, merely to save five dollars to the defendants, and on that ground only the motion is denied."(1)

Nor, on the contrary, are value and importance of themselves sufficient to procure a new trial, unless coupled with some departure from law, or a finding against the evidence, as in *Vernon v. Hankey*,(2) Action for money had and received. Plea, general issue, and verdict for plaintiff, £16,930. The court granted a rule to show cause why there should not be a new trial. The judge reported that one Tyler had committed a clear act of bankruptcy, on the night of the second of May, 1785, which was well known to the defendants, who were her bankers; and it appeared by their books, that so much as the verdict was taken for, had been received by them on account of the bankrupt after that time. On a motion for a new trial, the case was elaborately argued, and much stress was laid on its importance, by reason of the amount of the verdict. The judges delivered their opinions *seriatim*, and discharged the rule. *Buller, J.*, best illustrates the rule: "The grounds which have been mentioned by the defendants' counsel, have frequently been allowed, and ought always to govern the court in granting rules to show cause why there should not be a new trial. But there is a wide difference between the reasons which ought to induce the court to grant such rules, and those which are sufficient to

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(1) Vide 3 Johns. Rep. 237.

(2) 2 Term Rep. 113.

grant new trials. It is well known that in this court a rule to show cause why there should not be a new trial, is granted for little more than asking, if any plausible doubt can be stated; but if this were to be followed up by making the rule absolute on the same grounds, it would be great injustice to the parties, and would tend to multiply litigation to an enormous degree. Value alone is not a ground for granting a new trial, although it frequently weighs in granting a rule to show cause.”(1)

8. When the judge who tries the case expresses himself satisfied with the verdict, although against the weight of evidence, the court will seldom set it aside and grant a new trial: on the contrary, when he is dissatisfied it is almost of course to grant it.

The rule is thus laid down by Judge *Buller*—“Upon a motion for a new trial, the way is to grant a rule to show cause, and then the puisne judge of the court speaks to the judge who tried the cause (if it be not one of the same court) and obtains a report from him of the trial, and also a signification of what his sentiments are upon it. If the judge declare himself satisfied with the verdict, it hath been usual not to grant a new trial, on account of its being a verdict against evidence. On the other hand, if he declared himself dissatisfied with the verdict, it is pretty much of course to grant it.”(2)

In one case, *Wheeler v. Pitt*,(3) the verdict was for the plaintiff, but on the report of *Willes*, Ch. J., before whom the cause was tried, that the weight of evidence was, in his opinion, with the defendant, a new trial was granted.

In *Berks v. Mason*,(4) *Ryder*, Ch. J., before whom the case was tried, reported that there was evidence on both

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(1) Vide *Infra* “Small Damages,” Chap. XII.

(2) *Bull N. P.*, 327. (3) 6 *Bac. Ab.* 663. (4) *Sayer*, 264.

sides ; but that the evidence for the party in whose favour the verdict was, was so very slight that the jury ought not, in his opinion, to have regarded it, and that the evidence for the other party was very strong, and he added that he was dissatisfied with the verdict. A new trial was granted.

In *Rands v. Tripp*.<sup>(1)</sup> The plaintiff was a tobacco-nist, and lived near Guildhall, London. He married the daughter of the defendant, who was an alderman in Hull, and had four hundred pounds portion with her. After the marriage the defendant spoke merrily before three witnesses, "That if his son-in-law would procure himself to be knighted, so that his daughter might be a lady, he would then give him two thousand pounds more, and would pay one thousand pounds, part thereof presently, upon such knighthood, and the other one thousand pounds, within a year after. The son-in-law, without acquainting the defendant, did, about nine months afterwards, procure himself to be knighted and brought an assumpsit for the two thousand pounds, which was tried before *North*, Ch. J., at Guildhall, and the jury gave £1,500 damages. The chief justice thought it was a hard verdict, for he was not clearly satisfied that the agreement was good, it being only for words which were spoken by the old man when he had but a weak memory. And thereupon a new trial was granted, because the chief justice thought it was fit so to be.<sup>(2)</sup>

So, in *Letgoe v. Pitt*,<sup>(3)</sup> in ejectment, and verdict for lessor of plaintiff. The chief justice certified, that the premises in question were copyhold, and both parties claimed under one George Cromwell, who had made two several surrenders. The question upon the trial was, whether Cromwell was *compos mentis* at the time of the

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(1) 2 Mod. 199.

(2) Vide 3 Younge & Jervia, 264.

(3) Barnes, 439.

surrender under which the defendant claimed ; that nothing was objected to Cromwell's insanity, till twelve years after such surrender, and that the chief justice was of opinion the strength of the evidence was with the defendant. The court ordered a new trial, upon payment of costs.

In *Lessee of Cain v. Henderson*,<sup>(1)</sup> it was held, when the judge who tried the cause is not dissatisfied with the verdict, it must be a very strong case that will induce this court to grant a new trial.

And in *Harrison v. Rowan*.<sup>(2)</sup> Verdict for plaintiff, and motion for a new trial, and one ground taken was, that the verdict was against evidence. *Washington, J.*, delivering the opinion of the court upon this point, asks—"Is this verdict warranted by the evidence? or, in other words, ought we to be, or are we, satisfied with it? Speaking for myself, I must declare, that I am satisfied. But my brother, who sat with me upon the trial of the issue, authorizes me to say, that he is not entirely so. This difference of opinion, upon a question which conscience alone can decide, is conclusive to induce my acquiescence in the motion. As a man, I am satisfied with the verdict; but as a judge, I ought not to be satisfied, unless the court is so. Let a new trial be awarded."

But a new trial, when no injustice appears to have been done, will be refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence. In *Ashley v. Ashley*,<sup>(3)</sup> the judge, before whom the cause was tried, reported, that the weight of evidence was with the plaintiff, and that, in his opinion, the jury ought to have found a verdict for him. A new trial was refused, the court observing, that, as there

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(1) 2 Binn. 108.

(2) 4 Wash. C. C. R. 32.

(3) 2 Str. 1142.

was evidence for the defendant, the jury were the proper persons to judge on which side the weight of evidence was.

And in *Smith v. Huggins*,<sup>(1)</sup> a new trial was refused, although *Lee*, Ch. J., reported, that the evidence for the plaintiff was very weak, and that he had summed up the evidence strongly for the defendant.<sup>(2)</sup>

And held, in *Fehl v. Good*,<sup>(3)</sup> that though a verdict be against the opinion of the judge who tried the cause, yet if it turned upon the credit of witnesses, a new trial will not be granted, except in extraordinary cases.<sup>(4)</sup>

It may be proper to add, that in most of the states a different practice prevails from what obtains in England. There, the case is reported by the judge who presided at the trial; here, generally, it is made up by the counsel on both sides, and settled by the judge. Of course, where this practice prevails, it is not probable, that the opinion of the presiding judge can have the same controlling influence as in the English courts. With us, in New-York, not only does this practice in making up the case exist, but since the amendment of the constitution, the judges of the supreme court sit only in bank, and do not, as formerly, travel the circuit, and preside at *nisi prius*. To them, therefore, this last rule has strictly no application.

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(1) 2 Str. 1142.

(2) Et vide 1 W. Blacks. 1. 2 Str. 1105. (3) 2 Binn. 495.

(4) Vide 2 Serg. & Rawle, 298. 2 S. C. Con. Rep. 452. 323.

## CHAPTER XII.

### BY REASON OF THE DAMAGES.

THE object of an action being the recovery of a sum of money for a demand unjustly withheld, or a breach of contract or wrong committed, it is the special province of the jury to ascertain the justice of the demand, the terms of the contract, or the extent of the injury, and by their verdict, to liquidate the amount. In actions on, or arising out of contracts, they are furnished by the evidence with a rule to measure the just amount; but in actions sounding in damages, or torts to the person, they are to be guided by their sense of justice. It is here, however, they are most liable to err. Their feelings and passions are appealed to and excited, and necessarily less or more mix up with the facts; and hence their finding frequently betrays undue motives, and manifests an excess of feeling on one side or the other; sometimes in a culpable excess of damages, and at others in an unjust diminution. At one time, it was doubted whether, in cases of mere personal tort, the court had the power to interfere, on the ground of excessive damages, or the contrary.<sup>(1)</sup> But the practice has been long settled, conceding to the court the right to control verdicts in relation to damages, as well as to every other incident, in all cases without exception;<sup>(2)</sup> with this difference,

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(1) Vide Sayre's Law of Damages, 210—238. 3 Anst. 808.  
1 Term Rep. 277. 5 Taunt. 277.

(2) Vide Sayre's, ut supra. 2 Tidd, 917. Gra. Prac. 514.

however, that on questions of contract, or when an ascertained test of the correct amount is furnished, the court interposes the correction with less reluctance than in cases of mere injury, when the damage is at large, and the finding on that point must of necessity be arbitrary. The practice, in this particular, is thus laid down by Justice *Buller*; —“In actions founded upon torts, the jury are the sole judges of the damages; and therefore, in such cases, the court will not grant a new trial on account of the damages being trifling or excessive. But in actions founded upon contract, and where debt would lie, and before *Slade's case* would have been brought, the court will inquire into the circumstances of the case, and relieve if they see reason.”(1) To this part of the subject the subsequent rules will apply.

1. In *personal torts* and actions, generally sounding in damages, it being within the strict province of the jury to estimate the injury; unless there be a manifest abuse, the court will not interfere. In its general acceptation, this rule applies equally to an unjust lessening of the damages, as to an intemperate excess—as well in inquests as contested cases.

In an *Anonymous case*,(2) the defendant moved for a new writ of inquiry into London, and to stay the filing of the former, because of excessive damages given; but it was denied.

*Chisvers v. Lambert*.(3) Skinner moved for defendants to set aside the inquisition taken before the coroner, upon a writ of inquiry for excessiveness of damages, which were £50. It was an action brought for a false return of a *rescous*, whereby the present plaintiff, one Cripple, having brought his action against the defendants for the false return, had recovered £20 damages. The court made a

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(1) Bull. N. P. 327.

(2) 1 Mod. 2.

(3) Barnes, 229.

rule ; whereupon *Eyre* showed cause, and produced affidavits, that plaintiff, who kept a tavern at Twickenham, was taken up by a writ of *rescous*, founded upon the said return, and carried to Newgate, where he was sometime imprisoned and put to very great expenses ; and the counsel for the defendants attended before the coroner at the execution of the writ of inquiry. The court discharged the rule.

So, in *Burges v. Nightingale*.<sup>(1)</sup> A writ of inquiry was executed, and plaintiff moved to quash the inquisition, by reason of the smallness of damages, which was denied. *Prince*, for plaintiff ; *Wright*, for defendant. The court ruled that where the jury find any damages, the inquisition must stand ; *aliter*, had they found no damages.

And in *Mauricet v. Brecknock*.<sup>(2)</sup> Motion for a rule to show cause, why the inquisition taken upon the writ of inquiry in this cause, should not be set aside, on account of the smallness of the damages. It was an action on the case, for maliciously suing out a commission of bankruptcy against the plaintiff, and also for maliciously holding him to bail for £1020. The defendant let judgment go by default, upon which a writ of inquiry was executed, and the jury gave only £5 damages. The affidavit upon which Baldwin moved, stated, that the plaintiff's attorney had proved, before the jury, that his bill of costs to the plaintiff for superseding the commission of bankruptcy, amounted to upwards of £30, and that no evidence was produced on the part of the defendant. The court, after some difficulty, granted the rule. And upon cause shown, Lord Mansfield—"He has confessed malice in point of form, and merely for the purpose of letting the plaintiff in,

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(1) Barnes, 230.

(2) 2 Doug. 509.



to prove the degree of injury he has received." And rule discharged.(1)

These are cases on writs of inquiry, but they fall within the rule, the courts taking no distinction between inquests and verdicts,(2) and are well calculated to illustrate the principle embraced in it, that the jury are the sole judges; and so long as no abuse appears, their finding will be conclusive. As a further illustration, the decisions of the courts, in contested cases, may be adduced, in applications for new trials in every species of tort, on the ground of damages: *Exempli gratia*,—

Actions of *crim. con.*, a species of personal tort, *sui generis*, from its nature placed almost beyond the control of the courts, and emphatically consigned to the province of the jury, in the matter of damages. Here the courts will not interfere, without proof of the most flagrant abuse.

In *Wilford v. Berkley*.(3) Motion for a new trial, for excessiveness of damages. It was an action for criminal conversation with the plaintiff's wife, and the jury, a special one, had given £500 damages. The defendant was a clerk in the exchequer, during pleasure, and at a salary of £30 a year only, which was his whole subsistence. The court were all clear and unanimous that, although there was no doubt of the power of the courts, to exercise a proper discretion in setting aside verdicts, for excessiveness of damages, in cases where the quantum of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the court could properly judge of the degree of the injury, and could see manifestly, that the jury had been outrageous in giving such damages, as greatly exceeded the injury; yet the case was very different, where it depended upon circumstances which were properly and solely under the cognizance of the jury. They held the

(1) Vide 2 Str. 1259.

(2) Vide 5 Johns. Rep. 138, *in notis*.

(3) 1 Burr. 609.

case of criminal conversation, to be of this latter kind ; for the injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of, and in the present case, they could not say that £500 was too much, or that £50 would have been too little.

The case of *Chem v. Brig*,<sup>(1)</sup> noticed by the reporter, and subjoined to the last cited case, before Lord Chief Justice Pratt, was exactly similar to this ; the same sum of £500 was given, and a like motion was rejected then, upon the same principle as the courts rejected the former one.

In *Duberley v. Gunning*,<sup>(2)</sup> an attempt was made to show the connivance of the plaintiff at the criminal intercourse : Lord Kenyon, in summing up the evidence, told the jury that, if they were of opinion that the husband had consented to the infidelity of his wife, it took away the ground of action, and they should find a verdict for the defendant ; or if he had been guilty of gross negligence or inattention to her conduct, that would go far in mitigation of the damages, and to this opinion he himself most strongly inclined ; but they were to assess what damages, under all the circumstances, the plaintiff was entitled to. The jury found a verdict for the plaintiff with £5000 damages. A rule was obtained to show cause why the verdict should not be set aside, and a new trial had, as a verdict against evidence, and on the ground of excessive damages. It was pressed upon the court that this question of damages being within the sole province of the jury, an application for a new trial, on the ground of excess, is an appeal from the proper jurisdiction to another which has no cognizance of such a question. But, per Lord Kenyon, Ch. J.—“ This is by no means encroaching upon the juris-

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(1) 1 Burr. 609.

(2) 4 Term Rep. 651.

duction of the jury, nor drawing the question to the examination of a different tribunal from that to which the constitution has referred it, for it is not substituting a different judgment in the place of that which has been pronounced, but requiring the same jurisdiction to reconsider that opinion, which appears to be erroneous. Without this general power in the court, injustice would be done in many cases. Under all the circumstances, I think the damages were much larger than ought to have been given. But here I doubt what conclusion I ought to draw from all the premises. And my difficulty arises from my being unable to fix any standard, by which I can ascertain the excess, which, according to my view of the case, I think the jury have run into. Where there is no such standard, how are the errors of the jury to be rectified? What measure can we point out to them by which they ought to be guided? I should have been satisfied even if nominal damages only had been given: but, as the jury have formed a different judgment upon the evidence, I know not why my judgment should be preferred to theirs upon such a subject." And *Per totam Curiam*.—The rule was discharged.(1)

And in *Chambers v. Caulfield*.(2) Action of *crim. con.*, and verdict for plaintiff, with £2000 damages. Motion to set aside verdict, and one ground taken was, that the damages were excessive. It appeared that the plaintiff and his wife, by whom he had many children, had lived happily together, until his suspicions of the defendant began; after which there had been differences and occasional separations between them, from time to time, until their final separation, in consequence of the adultery. This was two or three years after a deed of separation had been entered

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(1) Vide 2 Mod. 150. 1 Lev. 97. Comb. 170.

(2) 6 East, 244.

into between them, and after they had lived together again. After an elaborate argument, Lord *Ellenborough* delivered the opinion of the court—"As to the second ground upon which the new trial was moved for, that of excessive damages, if it appeared to us, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives or some gross error, or misconception on the subject, we should have thought it our duty to submit the question to the consideration of another jury; but this does not, upon a review of the whole evidence, appear in the present instance to have been the case." And rule discharged.

In *Torre v. Summers*,<sup>(1)</sup> a case of *crim. con.*, tried before Mr. Justice *Bay*, at Charleston, in 1819, the jury gave \$5000 damages; and upon a motion to set the verdict aside as excessive, the court refused it, giving, as their reason, that it was a case peculiarly within the province of the jury, that it was not too much for the wounded feelings of a husband, nor by way of example to purify and sustain the public morals.

So, in actions for a *malicious prosecution*; as in an *Anonymous* case.<sup>(2)</sup> Defendant moved for a new trial, and Mr. Justice *Page* certified the damages, which were £50, to be excessive; but the action appearing to be brought for a malicious prosecution, and plaintiff having been imprisoned and tried for felony, the court were of opinion, that, in the nature of the thing, the damages appeared to be moderate, and therefore refused to grant a new trial.

And in *Farmer v. Darling*.<sup>(3)</sup> Malicious prosecution, and damages £250. Motion to set aside the verdict on the

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(1) 2 Nott & M'Cord, 267.

(2) Barnes, 436.

(3) 4 Burr. 1971.

ground of excessive damages, and verdict against evidence. The defendant had maliciously indicted the plaintiff for two nuisances, in defending which he had been put to great expense. Lord *Mansfield*.—"As to the excessiveness of the damages, it does not appear by the verdict, how far the jury gave it upon the *bill*, and how far, upon the whole circumstances of the case taken together. The end and tendency of these two indictments, was to drive this plaintiff from his business of a poulterer, after having long carried it on. This was sworn to have been the prosecutor's view in preferring them, and they might affect the man's credit. There are many circumstances which make it reasonable, not to indulge the present defendant in sending it to a new litigation, only to abate the quantum of the damages, when he has been so much in the wrong." Therefore, a new trial was refused.

And, in *Gilbert v. Burtenshaw*,<sup>(1)</sup> for maliciously indicting the plaintiff for perjury, and verdict for plaintiff, with £400 damages. Motion for a new trial, on the ground of excessive damages. Lord Chief Baron *Smythe*, before whom the cause was tried, was very well satisfied with the verdict. Per Lord *Mansfield*, denying the motion.—"The whole ground of the application rests on the point of excessive damages. I should be sorry to say, that in cases of personal torts, no new trial should ever be granted for damages, which manifestly show the jury to have been actuated by passion, partiality or prejudice. But it is not to be done without very strong grounds indeed; and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done, where the court may feel, that if they had been on the jury they would have given less damages, or where they might think the jury themselves would have completely discharged their

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(1) Cowp. 230.

duty in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion, than such a case as this; and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line.”(1)

And, in *Leith v. Pope*,(2) where the defendant had indicted a baronet for a larceny, under circumstances of great outrage, and with a view to screen himself from the charge of usury on loans made to the plaintiff, and the jury gave a verdict £10,000 damages. On an application to the court for a new trial, on account of the excessiveness of the damages, Lord Chief Justice *De Grey*, in his report of the case, added his opinion, with which the other judges concurred, that in cases of tort, the court will not interpose on account of the largeness of damages, unless they are so flagrantly excessive, as to afford internal evidence of the prejudice and partiality of the jury. That is, unless they are most outrageously disproportionate, either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant. Applying this rule, his lordship proceeded, “the plaintiff is a man of family, a baronet, an officer in the army, and a member of parliament, which may render the value of an injury done to him, especially when directed against his life, adequate to £10,000. The court cannot enter into stories of private scandal, which have been liberally propagated on both sides. The defendant appeared upon evidence to be exceeding wealthy, and well able to sustain such a verdict. In possession, upon record, of seventy-seven judgments, to the amount of more than £100,000, in the actual receipt of near £3000 per annum, annuities for young gentlemen’s lives. This was not then, nor is now, contradicted by the defendant.” And rule discharged.(3)

(1) Vide *Lofft*, 771.

(2) 2 *W. Blacks.* 1327.

(3) Vide 2 *Str.* 691.

*Hewlett v. Cruchley*,<sup>(1)</sup> for a malicious prosecution, for causing the plaintiff to be indicted for seven distinct felonies, and verdict for the plaintiff, with £2000 damages. The principle ground, on motion for a new trial, was, that the damages were excessive. *Mansfield*, Ch. J.—“As to that, it is extremely difficult to estimate damages. You may take twenty juries, and every one of them will differ from £2000 down to £200. I have always felt that it is extremely difficult to interfere and say when damages are too large. Nevertheless, it is now well acknowledged in all the courts of Westminster Hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the court will send the inquiry to another jury. There are some damages so large, that it is impossible, but that every man must acknowledge they are too large. But in every case where the courts interfere, they always go into all the circumstances of the plaintiff and the defendant, and put themselves in their situation, and enter into all their conduct.” And after enumerating the sufferings of the plaintiff, his lordship adds.—“Could any one say that any rational man of character, would for £2000 put himself in this situation? If not, the damages are not excessive.”<sup>(2)</sup>

And in a recent case, *Caddy v. Barlow*,<sup>(3)</sup> for maliciously causing the plaintiff, an infant, to be indicted for felony, and verdict £100 damages. Motion for a new trial, and, among other reasons assigned, was, that the damages were excessive. Lord *Tenterden*, Ch. J.—“The damages which she has obtained, are larger perhaps than we may think altogether called for by the circumstances of the case. But it is impossible to forget that the defendant’s conduct has been, in many respects, extremely culpable; and as the

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(1) 5 Taunt. 277.

(2) Vide 4 Term Rep. 659, *in notis*.

(3) 1 Man. & Ry. 275.

whole transaction was fully before the jury, I do not feel myself at liberty to say that they have exercised an improper discretion in awarding the damages they did. Upon the whole, therefore, I am of opinion, that no rule ought to be granted in this case." The other judges concurred, and rule refused.

In like manner in actions for *seduction*. Thus, *Tulidge v. Wade*.<sup>(1)</sup> Trespass against the defendant, that he made an assault upon A. B., daughter and servant of the plaintiff, and got her with child, whereby he lost the benefit of her service. The defendant pleaded not guilty. Verdict for the plaintiff, £50 damages. Motion for a new trial, grounded upon an affidavit tending to show, that under the circumstances of the case appearing at the trial, the damages were excessive; and also that evidence of a promise of marriage was admitted. *Wilmot*, Ch. J., denying the motion.—"Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings; yet the jury have done right in giving liberal damages. Brother *Gould* being satisfied with the verdict, if much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly received the defendant, and permitted him to make his addresses to his daughter."<sup>(2)</sup>

So, *Bennett v. Allcott*.<sup>(3)</sup> Trespass for breaking and entering the plaintiff's house, debauching his daughter, and getting her with child, *per quod servitium amisit*. Plea, not guilty, and verdict for the plaintiff with £200 damages, which the learned judge thought were not excessive. A

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(1) 3 Wils. 18.

(2) Vide *Applegate v. Ruble*, 2 Marsh. Kent. Rep. 130.

(3) 2 Term Rep. 166.



motion was made to set this verdict aside, chiefly because the damages were excessive. *Ashhurst, J.*—"It is true, indeed, that the damages are considerable, and if we had been on the jury, we possibly might have been disposed to have given a smaller sum; but in an action for this species of injury, the court will not try that fact, the judge who tried the cause having declared himself satisfied with the verdict," and the rule was discharged.(1)

And, in *Sargent v. Deniston*.(2) Case for seduction of the plaintiff's daughter and servant. Plea, not guilty, and verdict for plaintiff, \$920 damages. Motion to set aside the verdict, upon the ground, among others, of excessive damages. *Sutherland, J.*—"I do not think we are authorized to interfere, on the ground of excessiveness of the damages, although they appear to us much larger than they should have been. There were no aggravating circumstances in the case; no arts of seduction were used, for none were necessary. The character of the daughter had long been considered loose and abandoned. There were no wounded feelings, or blasted reputation, to aggravate the moral impropriety of the defendant's conduct, and to call for exemplary damages. We should have been better satisfied with a verdict, barely sufficient to remunerate the plaintiff for her actual loss. But the damages are not so flagrantly outrageous and extravagant, as necessarily to evince intemperance, passion, partiality or corruption, on the part of the jury; and where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury. It is the judgment of the jury, and not of the court, which is to determine the damages in actions for personal injuries."(3)

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(1) 3 Burr. 1378. 2 Lord Raym. 1032.

(2) 5 Cowen, 106.

(3) Vide *Irwin v. Dearman*, 11 East, 22.

It may be added, as worthy of remark, that in *Moran v. Dawes*,<sup>(2)</sup> where the jury gave a verdict for the plaintiff, and \$9000 damages, the force of the rule was so felt by the defendant's counsel, that although they moved for a new trial on other grounds, they took no notice of the excessiveness of the damages.

Actions for *false imprisonment* are within the rule, and furnish numerous strong examples of the inflexible determination of the court to uphold verdicts objected to on the ground of damages. As in *Leeman v. Allen*,<sup>(2)</sup> trespass, assault and imprisonment. Plea, the general issue; and verdict for the plaintiff with £300 damages. It appeared that the plaintiff kept a tavern in Chancery Lane; that the defendants were called reforming constables, who, under pretence of a warrant from one Kinaston, a justice of peace, entered the plaintiff's house with staves, there seized and carried her into the yard, and threatened to send her to prison. Motion for a new trial on account of variance, and that the damages were excessive. Chief Justice *Wilmot*—“As to the excessiveness of damages, courts should be very cautious how they overthrow verdicts that have been given by twelve men upon their oaths; however if damages be unreasonable and outrageous indeed, as if £2000 or £3000 was to be given in a little battery, which all mankind might see to be unreasonable at first blush, certainly a court would set aside such a verdict.—The court must be able to say the damages are beyond all measure unreasonable, though they cannot say exactly what damages ought to be given. I do not think the damages excessive in the present case.” The whole court refused to set aside the verdict, and the plaintiff had judgment.<sup>(3)</sup>

So in *Huckle v. Money*.<sup>(4)</sup> Trespass, assault and im-

(1) 4 Cowen, 412.

(2) 2 Wils. 160.

(3) Vide *Dodd v. Hamilton*, 12 Price, 708.

(4) 2 Wils. 205.

prisonment. issue joined. upon the general issue not guilty, tried before the lord chief justice. when it was proved for the plaintiff that he was a journeyman printer, and was taken into custody by the defendant. a king's messenger, upon suspicion of having printed the North Briton, number 45; that the defendant kept him in custody about six hours but used him very civilly. so that he suffered very little or no damages. Verdict for the plaintiff £300, and motion to set it aside as excessive. Lord Chief Justice *Wilmet* denying the rule—"The law has not laid down what shall be the measure of damages in actions of tort. The measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances. Torts or injuries which may be done by one man to another are infinite. In cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c., the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages. The few cases to be found in the books of new trials for *torts*, shows that courts of justice have most commonly set their faces against them, and the courts interfering in these cases would be laying aside juries." (1)

So in *Beardmore v. Carrington*, and others. (2) Action of trespass and false imprisonment. It appeared at the trial, that the defendants entered the house of the plaintiff, who was an attorney. examined his file of letters, opened his desk, took out the books, looked into his ledgers, and finally carried the plaintiff away in a coach to prison, where he was detained six days in close custody, not being permitted to speak with his clients, or give directions as to his business; and that pen, ink, and paper were re-

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(1) Vide *Deacon v. Allen*, 1 Southard, 338. *Winans v. Brooks*, 2 Ibid. 847.

(2) 2 Wils. 244.

fused, and he prohibited from writing to his friends. The defendants attempted to justify, under a warrant of the secretary of state, which turned out to be illegal. The jury found a verdict for the plaintiff of £1000 damages. The defendant moved to set aside the verdict, and for a new trial, alleging that the damages were excessive. *Per Curiam*.—"We are called upon on our oaths to say, whether these are excessive damages or not, and ought to have very clear evidence before us, before we can say they are excessive. There is a great difference between cases of damages which be certainly seen, and such as are ideal; as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are matter of opinion, speculation, or ideal. We desire to be understood, that this court does not say, or lay down any rule, that there can never happen a case of such excessive damages in tort, where the court may not grant a new trial; but in that case, the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush. The court must consider these damages as given against Lord Halifax, and can we say that £1000 are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and prys into all his secret and private affairs, and carries him from his house and business, and imprisons him for six days?—We cannot say the damages of £1000 are enormous, and therefore the rule to show cause why a new trial should not be granted must be discharged."(1)

And in *Fabrigas v. Mostyn*.(2) Action of trespass and false imprisonment against the defendant, who was gover-

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(1) Vide *Smith v. Boucher*, Ibid. 250, in *notis*. 2 Taylor's N. C. Rep. 31.

(2) 2 W. Blacks. 929.

nor of Minorca. The jury, on full proof of the facts, gave a verdict for the plaintiff, with £3000 damages. The defendant moved for a new trial, and one ground urged was, that the damages were excessive. But the court were unanimously of opinion, that it was very difficult to interpose, with respect to the quantum of damages in actions for any personal wrong—not that in no case of personal injury the damages can be excessive; some may be so monstrous and excessive as to be in themselves an evidence of passion or partiality in the jury. And in this case, the rule was discharged: the court observing, that “the jury, not the court, are to estimate the adequate satisfaction.”(1)

And so it has been adjudged in cases of outrageous assault and battery. *Grey v. Sir Alexander Grant*.(2) Action of assault and battery, and a verdict for the plaintiff, with £200 damages. It was moved to have the verdict set aside, and a new trial, for excessiveness of damages. A turtle, intended for the plaintiff, had been delivered, through mistake, to the defendant; the plaintiff went to him, and demanded it of him; but he said he had invited some friends to dine with him upon it, and refused to deliver it, or to pay for it, and pointing at the plaintiff, said, If that man was to ask a turtle of me, I would give him one. The plaintiff answered, This is very ungentleel; and the defendant shoved the plaintiff out of his house with his elbow, who thereupon asked the defendant if he would waive his privilege of parliament, but he refused. The plaintiff then said to him, You are a scoundrel; and the defendant gave him a blow on the face, which caused him a black eye. *Per Curiam*.—“The plaintiff has been used unlike a gentleman by the defendant, in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him to seek his revenge in

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(1) Vide Green's N. J. Rep. 294.

(2) 2 Wils. 252.

another way than by law, and therefore we think the damages are not excessive."

So, *Benson v. Frederick*,<sup>(1)</sup> an action brought against the defendant, who was colonel of the Middlesex militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive twenty lashes from two drummers. The jury found for the plaintiff, £150 damages; and now, for that reason, the defendant moved to set aside the verdict. Lord *Mansfield* said, in the present case, he was not dissatisfied with the verdict. The defendant had manifestly acted arbitrarily, unjustifiably, and unreasonably. He had ordered this innocent man to be flogged, merely out of spite to his major; because the major, who gave the man the furlough, had offended him, in which he acted *malo animo*. His lordship acknowledged, that he thought the damages were very great, and beyond the proportion of what the man had suffered; and yet, under the whole circumstances of the case, he was not for granting a new trial. The court were unanimous in discharging the rule.<sup>(2)</sup>

So in *Ducker v. Wood*.<sup>(3)</sup> Action of assault. Verdict for £150. *Mingay* moved to set it aside, on account of excessive damages. Lord *Mansfield* said, there was no doubt but that the court had the power of taking the opinion of a second jury, in any case where the damages were excessive; but that all these questions depended on their own circumstances, on which the court would exercise their discretion. But in this case, upon hearing the report of the judge, the court thought fit to reject the motion.

So in *Chanellor v. Vaughn*.<sup>(4)</sup> Assault and battery.

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(1) 3 Burr. 1845.

(2) Vide *Lloyd v. Monpoey*, 2 Nott & M'Cord, 446. *Allen v. Craig*, 1 Green, 294.

(3) 1 Term Rep. 277.

(4) 2 Bay, 416.

Verdict for plaintiff. It appeared to have been a very violent assault, and without provocation on the part of the plaintiff, in which the jury gave heavy damages; sum not reported. The present was a motion for a new trial, on the ground of excessive damages. But the judges unanimously refused it, on the ground, that wherever an assault was wantonly committed upon the person of a peaceable citizen, without provocation, as appeared from the report of the judge who tried the cause, it was a very proper case for the consideration of the jury. It was their province to weigh well, and consider all the circumstances of the case, and to assess such damages as they thought would be commensurate with the nature of the injury, and such as would effectually check such an evil. And the court added, they would never interfere in such cases, unless the damages were unreasonable beyond measure.

To *libel and slander* suits, the rule is peculiarly applicable. Motions for new trials in these cases are greatly discountenanced. Next to actions for *crim. con.*, the courts have surrendered them to what Lord Chief Justice *De Grey*, on one occasion, citing *Comberbach*, called the despotic power of the jury.(1)

Thus, in *scandalum magnatum*, an action known in this country only by name, but well adapted to illustrate the rule, and the reasons of which we have adopted in more humble instances of defamation. Lord *Townsend v. Hughes*.(2) The plaintiff brought an action of *scandalum magnatum*, for these words, spoken of him by the defendant—"He is an unworthy man, and acts against law and reason." Upon not guilty pleaded, the case was tried, and the jury gave the plaintiff £4000 damages. Motion for a new trial for various causes; one of which was that the damages were excessive. The

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(1) *Shatpe v. Brice*, 2 W. Blacks. 942.

(2) 2 Mod. 150.

judges delivered their opinions *seriatim*. In denying the motion, *North*, Ch. J., said, that as a judge, he could not tell what value to set upon the honour of the plaintiff; the jury had given four thousand pounds, and therefore he could neither lessen the sum nor grant a new trial, especially since by the law the jury were judges of the damages; and it would be very inconvenient to examine upon what account they gave their verdict. They, having found the defendant guilty, did believe the witnesses, and he could not now make a doubt of their credibility. *Wyndham*, J., and *Scroggs*, J., accorded *in omnibus*. The latter added—that if he had been on the jury, he should not have given such a verdict, and if he had been plaintiff, he would not take advantage of it, but would overcome with forgiveness such follies and indiscretions, of which the defendant had been guilty; but that he did not sit there to give advice, but to do justice to the people.(1)

In an action for these words spoken of a tradesman, “thou art a beggarly rogue, go pay thy debts,” the jury found a verdict for the plaintiff, with £800 damages. A new trial being moved for, on account of the excessiveness of the damages, it was refused; because the judge, before whom the cause was tried, reported that the plaintiff had given the defendant no provocation, and that he believed the jury had done what they thought to be right.(2)

The first case of note with us, in which the rule was laid down broadly, is *Tillotson v. Cheetham*.(3) Action for a libel. A motion was made, on the part of the defendant, to set aside the inquisition, taken on the writ of inquiry in this case; damages assessed at \$1400. The grounds of application were for irregularity, and for excessive damages. *Kent*, Ch. J., delivered the opinion of the court—“The second ground of the present motion is, the excess of dam-

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(1) Vide *Duke of York v. Pilkington*, 2 Shower, 246.

(2) *T. Jones*, 200.

(3) 2 Johns. Rep. 63.



ages. We cannot interfere on account of the damages. A case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages, in an action of slander. We have no standard by which we can measure the just amount, and ascertain the excess. It is a matter resting in the sound discretion of a jury. The plaintiff, when libelled, was a high and confidential officer of government; and by the libel he is held out to the world as an object of reproach. He is represented as being seduced into unworthy and dishonourable conduct, by motives equally mean and unworthy. This was a printed defamation, which is regarded in law as the most injurious and aggravated species of slander, because it has a wider circulation, makes a deeper impression, and has a more permanent existence." (1)

Again, in *Coleman v. Southwick*. (2) Action for a libel imputing treasonable sentiments and acts to the plaintiff. The defendant pleaded the general issue, with notice of justification. The jury found a verdict for the plaintiff, with \$1500 damages. On motion for a new trial, it was contended for the defendant, that the damages were excessive. The court, by *Kent*, Ch. J.—“The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case; and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, we cannot, consistently with the precedents, interfere with the verdict.” Again, “The law has not laid down what shall be the measure of damages in actions of *tort*. The measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances, as the

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(1) Et vide 5 Cowen, 119.

(2) 9 Johns. Rep. 45.

state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury. The court cannot interfere unless the damages are apparent, so that they can properly judge of the degree of the injury. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess." The motion was denied, *Spencer and Yates*, Justices, dissenting.

Again, in *Southwick v. Stevens*.<sup>(1)</sup> Action for a libel, charging the plaintiff, who was an editor, with being a confirmed lunatic. The defendant pleaded not guilty, with notice that the paragraph complained of was mere irony. The jury found a verdict for the plaintiff, \$640 damages. On a motion for a new trial, it was urged the damages were excessive. But, *Per Curiam*.—"The ground of the motion on account of excessiveness of damages equally fails. It was for the jury to determine how far the ridicule of the plaintiff was malevolent, and calculated to injure his feelings, or prejudice him in the eyes of the public. After the principles laid down on this question, in the case of *Coleman v. Southwick*, there does not appear any reasonable ground for interference on this point. The motion on the part of the defendant is denied."

Again, in a more recent, and what may probably be regarded as a more important case—*Root v. King*.<sup>(2)</sup> Case for a libel published by the defendant, as proprietor and editor of a newspaper of, and concerning the plaintiff, at that time president of the senate of this state. Plea not guilty, and notice of justification. The jury gave a verdict for the plaintiff, with \$1400 damages. A new trial was moved for on various grounds, and among others, that the damages were excessive. *Savage*, Ch. J., delivering the opinion

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(1) 10 Johns. Rep. 443.

(2) 7 Cowen, 613.

of the court—"In the case of *Tillotson v. Cheetham*,<sup>(1)</sup> the recovery was \$1400 in favor of the secretary of state, against a printer for a libel, imputing to him corrupt conduct. The court said, "we cannot interfere on account of the damages. A case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages, in an action of slander. The same point was so decided in *Coleman v. Southwick*,<sup>(2)</sup> and *Southwick v. Stevens*.<sup>(3)</sup> These cases were between editors and printers of newspapers. In actions for libel, and for other defamation, unless some rule of law has been violated; or there has been some improper conduct by the parties or jury, a new trial will not be granted."

So in *Cole v. Perry*.<sup>(4)</sup> Slander, and verdict for plaintiff, \$1000. And, on motion, the excessiveness of the damages was urged. But, *Per Curiam*.—"We cannot interfere with the verdict, on the ground that the damages are excessive. Though heavy, they do not afford evidence either of partiality, prejudice, intemperance, or corruption, on the part of the jury."

And in *Douglass v. Tousey*.<sup>(5)</sup> Action for a charge of theft, and verdict \$500. Motion for a new trial, and the excess of the damages urged. *Marcy, J.*—"The amount allowed the plaintiff is certainly very liberal; but the rule is, that in actions of slander, the court will not grant a new trial, on the ground of excessive damages, unless the amount is so flagrantly outrageous and extravagant, as manifestly to show that the jury acted corruptly, or under the influence of passion, partiality or prejudice. The verdict in this case does not warrant such an inference."

But the strongest case reported in this state is, *Ryckman*

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(1) 2 Johns. Rep. 63.

(2) 9 Johns. Rep. 45.

(3) 10 Johns. Rep. 443.

(4) 8 Cowen, 214.

(5) 2 Wendell, 352.

*v. Parkins*,<sup>(1)</sup> where it may well be doubted whether the rule has not been pushed to its utmost verge. The plaintiff having obtained a verdict for \$7000 damages, in an action of slander, charging him with perjury, the defendant made a case with a view of moving for a new trial, on the ground of the excessiveness of the damages; and obtained an order from the circuit judge, before whom the cause was tried, staying the proceedings until the case could be heard. But the plaintiff, on the facts set forth in the case, and on affidavit of the great wealth of the defendant, now applied for a rule to vacate the order to stay proceedings. And the court, per *Savage*, Ch. J.—“The slander in this case was of a wanton and wicked character, imputing to the plaintiff a crime of the most atrocious nature; and when the great wealth of the defendant is taken into consideration, there is nothing in the case to induce the suspicion of prejudice, partiality, or corruption on the part of the jury, in finding a verdict against the defendant, to the amount of \$7000.” The rule vacating the order to stay was granted, and the plaintiff allowed to enter up judgment.”<sup>(2)</sup>

The rule has been adopted in its full extent in Massachusetts, in *Clark v. Binney*.<sup>(3)</sup> Action for a libel contained in a pamphlet, charging the plaintiff, as a witness, with undue motives. The defendant pleaded a justification. The jury found a verdict for the plaintiff, with \$1000 damages. The defendant moved for a new trial, because the damages were excessive. *Lincoln*, J., delivered the opinion of the court. After advertng to the prominent cases in England, and the decisions of our supreme court, on the question of extravagant damages in

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(1) 9 Wendell, 470.

(2) Vide *Rundell v. Butler*, 10 Wendell, 119.

(3) 2 Pick. 113.

actions of this kind, the learned judge concludes :—" A plea of justification deliberately made, and placed upon the public records, and which the jury found was unwarranted by the truth of the matter therein alleged, is to be regarded as a deep aggravation of slander ; and without regard to the extraneous circumstances, of which the court cannot now be judicially informed, we are constrained to the conclusion, that if the damages are not in exact conformity with the rights of the plaintiff, yet they are not, in the language of the books, so flagrantly outrageous as manifestly to show the jury to have been actuated by passion, partiality or prejudice."

So, in *Bodwell v. Osgood*,<sup>(1)</sup> for a libel, charging the plaintiff, who was a schoolmistress, with want of chastity. Plea, the general issue, and verdict for the plaintiff, with \$1400 damages. The defendant moved for a new trial, because the damages were excessive. *Wilde, J.*—"As to the damages, they are certainly large, perhaps too large, but not so extravagant as to justify the interference of the court. We do not doubt our power to grant new trials, on the ground of excessive damages, in cases of personal torts; and, when they are clearly excessive, and greatly disproportionate to the injury proved, we are bound to interpose. But a strong case must be made out, and this does not appear to us to be such a case, considering the aggravated nature of the charge, and the situation of the parties. The plaintiff being an unprotected female, having nothing whereon to depend but an unblemished reputation, and the defendant being a man of wealth and influence, we cannot say, that the damages are clearly exorbitant."

And in a subsequent case, *Shute v. Barrett*,<sup>(2)</sup> Action for slander, charging the plaintiff with adultery. The plaintiff was superintendent of an alms-house, and the defendant

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(1) 3 Pick. 379.

(2) 7 Pick. 83.

a man of property. The words were spoken at a town meeting, on a debate relative to the appointment of a new superintendent, and the verdict was for \$707. The court refused to grant a new trial, on the ground of excessive damages. And in an action against the same defendant, by an unmarried female, who was an assistant in the alms-house, for the same slander, where the verdict was for \$591 damages, a new trial, on the ground of excessive damages, was also refused. *Parker*, Ch. J., places the reason for refusing the motion, in a novel and imposing view. "It is impossible," says he, "to extract any rule from the numerous decisions and *dicta*, which are so often cited as to become trite, except that any judge to whom the question is put, whether the verdict shall stand or not, must be satisfied, in his own mind, that the rule of fair compensation has been departed from; that passion, not reason, has decided, or that some undue influence has swayed the minds of the jury. And this conclusion they can arrive at only by revising the facts in the case, under the presumption, in favour of the jury, which the law will, in all cases, imply." (1)

So in South Carolina, *Neal v. Lewis*. (2) Slander, for calling the plaintiff a rascal, villain, swindler and thief, and verdict for the plaintiff, with \$3000 damages. Motion for a new trial, because damages excessive. The *Court*, after reviewing the facts, conclude—"Shall this court, therefore, take upon themselves to say, that \$3000 for such gross slanders were unreasonable or outrageous damages? They have no such power. It was for the jury to determine upon that point, and they have done so. The court, therefore, sees no ground to order a new trial on that account."

And in *Davis v. Davis*. (3) Action of slander, and ver-

(1) Vide *Coffin v. Coffin*, 4 Mass. Rep. 1.

(2) 2 Bay, 204.

(3) 2 Nott & M'Cord, 81.

dict for plaintiff, with \$500 damages. Motion for a new trial. On the point of excessiveness of damages, *Johnson, J.*, who delivered the opinion of the court, observes—“There are cases in which excessive damages alone have been made the basis of a new trial, but they are rare; and I trust that this court will never add to the number, except in cases of the most imperious necessity. They are always a subject for the exercise of the sound discretion of the jury; and this court will never interfere, unless they so far exceed all proportion to the injury as necessarily to strike every person at once with the conviction, that the jury have been led away, either by public prejudice or private feeling.” Motion denied.

Upon the whole, it appears that in actions for defamation, although the courts in every instance assert their power, no relief on the mere question of excessiveness of damages, in the present state of the practice, can reasonably be expected. In the vast range of this subject, and the numerous applications that have been made, the imagined case, of an outrageous verdict, has scarcely ever occurred.

The rule has been held to apply to actions of *trespass*. Thus, in *Redshaw v. Brooks* and others.<sup>(1)</sup> Trespass against the defendants, who were custom-house officers, for breaking and entering the plaintiff's house, and searching for prohibited and uncustomed goods. Verdict for the plaintiff, and £200 damages. The defendant moved for a new trial, alleging the damages were excessive. Lord Chief Justice *Wilmot*, who tried the case, reported the evidence, that the defendants came to the plaintiff's house and desired to see every place, and to search for prohibited goods, which they did, and opened many bundles of goods, but found none such; then they desired to go into the cellar, but the door thereof being locked, and the plaintiff

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(1) 2 Wils. 405.

himself being from home, and having the key of the cellar-door with him, his son sent for a blacksmith, and had the door opened; whereupon the defendants entered the cellar to search for cambrics and prohibited goods, but found none. The plaintiff's sons then told the defendants they had done the plaintiff great wrong, and would be brought to justice; the defendants continued the search about twenty minutes, and then departed. The chief justice further reported he was not dissatisfied with the verdict. *Clive, J.*—"As my lord chief justice is not dissatisfied, how can we say that these damages are too large?" A rule to show cause why there should not be a new trial was refused, *per totam curiam*.

So, in *Bruce v. Rawlins*.<sup>(1)</sup> Trespass for breaking and entering the plaintiff's house. The defendants suffered judgment by default. Upon executing the writ of inquiry, it was proved, that the defendants, who were custom-house officers, entered the plaintiff's dwelling-house, with a writ of assistance, to search for uncustomed goods; the plaintiff's wife and daughter being only at home, were frightened and much surprised, delivered the keys of several boxes and drawers, which the defendants searched, but found no uncustomed goods. They stayed in the house about an hour, and did very little or no damage. The jury gave a verdict of £100 damages. The defendant moved to set aside the inquisition, for excessive damages. *Wilmot, Ch. J.*—"This is an unlawful entry into a man's house, which is his castle, an invasion upon his wife and family, at peace and quietness therein, frightened and surprised by these defendants, who, under pretence of information received, and colour of legal authority, demand the keys of, and search all the boxes and drawers in the house.—The plaintiff being a butcher or inferior person makes no difference

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(1) 3 Wils. 61.



in the case. The suspicion of having run-goods in his house is a very injurious imputation upon him ; and though he is but a butcher, it is the same damage to him as if he was the greatest merchant in London. I am very clearly of opinion, that this is one of those cases wherein the court will not interpose." And, *Per totam Curiam*—rule refused.

And in *Sharpe v. Brice*.<sup>(1)</sup> Trespass against a custom-house officer, for an unsuccessful search after prohibited and uncustomed goods. Verdict for the plaintiff, with £500 damages. *Perrot*, B., who tried the cause, reported the damages to be very excessive, and that he advised an application for a new trial, which was accordingly moved for. *De Grey*, Ch. J.—“ It has never been laid down, that the court will not grant a new trial for excessive damages in any cases of tort. It was held, so long ago as in *Comberbach*,<sup>(2)</sup> that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly, that the same rule does not prevail upon questions of tort as of contract. In contracts, the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in torts, a greater latitude is allowed to the jury ; and the damages must be excessive and outrageous, to require or warrant a new trial.” The court discharged the rule.

And, in *Merest v. Harvey*.<sup>(3)</sup> Trespass *quare clausum fregit*. The evidence was, that the plaintiff, a gentleman of fortune, was shooting on his own manor, in a common field contiguous to the highway, when the defendant, a banker, a magistrate, and a member of parliament, who had dined and drank freely, after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to the plaintiff, and told him he would join his party, which the plaintiff positively declined, and gave him

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(1) 2 W. Blacks. 942.      (2) Comb. 357.      (3) 5 Taunt. 442.

notice not to sport on his land. But the defendant declared, with an oath, that he would shoot, and accordingly fired several times upon the plaintiff's land at the birds, which the plaintiff found, and used very intemperate language. The jury found a verdict for the plaintiff, with £500 damages, which the defendant moved to set aside for excess. *Gibbs*, Ch. J.—“I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain.” *Heath*, J.—“I remember a case where a judge gave £500 damages for merely knocking a man's hat off, and the court refused a new trial.”(1) Motion denied.

*Woodard v. Paine*.(2) Trespass for a pair of horses, wagon and harness. The defendant was a justice of the peace, and tried on an assault and battery, and issued execution thereupon, having no jurisdiction, of which he had been apprized, the jury rendered a verdict of \$270, about the value of the property in question, which the defendant moved to set aside as excessive. But the court, after reviewing the case, say—“Upon the whole, although the damages are higher than we think they ought to have been, yet as it is an action sounding in tort, the verdict must stand.”

So in *Hazard v. Israel*.(3) Trespass against a sheriff for misconduct of his officer, in the execution of a writ.

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(1) Vide 10 Serg. & Rawle, 399. (2) 15 Johns. Rep. 493.  
(3) 1 Binn. 240.

The jury found, under circumstances of great aggravation, a verdict for the plaintiff, with \$750 damages. The defendant moved to set it aside on the ground of excess. The court, *per Tilghman*, Ch. J., denying the motion—"The last reason offered for a new trial is, that the damages are excessive. This is the only point on which there could be a doubt. A distinction has been taken between exemplary damages, and those which are only a compensation for the injury sustained. This distinction is certainly worthy of great consideration by a jury, when a principal, who has been no way to blame, is sued for the conduct of his deputy. But, in point of law, if the sheriff is answerable at all, he must be answerable for such damages as the jury, on the whole circumstances, think proper to give. In the present instance, they have given exemplary damages, for the actual injury was nothing; but as the jury have thought proper to make the conduct of the defendant's deputy an object of public example, I cannot say, that I think them so altogether wrong that a new trial should be granted."

And in *Matthews v. West*.<sup>(1)</sup> Action of trespass committed with force in taking and carrying away a load of peaches from off the land of plaintiff, of which she was in peaceable possession, and, from the judge's report who tried the case, had been so for the space of thirty years. Verdict for plaintiff, with \$200 damages. The defendant moved for a new trial. The first ground was, that the damages were excessive. Mr. Justice *Grant* delivered the opinion of the court.—"In answer to the first ground, it is to be remarked, that the presiding judge reports the trespass to have been wanton and aggravated, by the circumstance of its having been committed in despite of the feelings of the plaintiff, and in opposition to her authority. In

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(1) 2 Nott & M'Cord, 415. Et vide, *Ibid.* 446.

a complicated injury of this kind, the rule adopted by the jury in estimating the damages is not only correct and legal, but redounds much to their credit, as it evinces a feeling, on the part of the jury, friendly to the good order and well being of society, and hostile to acts of violence and force. On this ground, therefore, the court entertain the opinion, that the damages given are by no means to be considered as excessive."

In *Reed v. Davis*.<sup>(1)</sup> Trespass, for breaking and entering the plaintiff's dwelling house, putting out his household furniture, and forcibly turning out the plaintiff, his wife and children. Plea, the general issue, and soil and freehold in another. The jury found a verdict for the plaintiff, for \$500 damages. The defendant moved for a new trial, because the damages were excessive. The court, by *Putnam, J.*—"As to the question, whether a new trial should be granted, because the damages are excessive, the court are equally divided; so the motion for a new trial, upon that ground, cannot prevail. Those of the court who are against a new trial for this cause, think there was such a combination of oppression, and personal violence, and indignity, attending the trespass, as fully to justify the verdict. The jury seem to us to have manifested a strong sense of the security which the dwelling-house should afford to its lawful possessor. They have proceeded upon higher grounds of damages than those which arise merely from bodily wounds and bruises. They have discovered a determination to vindicate the rights of the poor against the aggressions of power and violence. These motives are sound, and should be cherished; and we ascribe the amount of the verdict to those considerations, rather than to partiality, or passion, or any unworthy

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(1) 4 Pick. 216.

motive. The motion for a new trial cannot be sustained."

The rule equally applies to all actions generally, sounding in damages. *Ex. gr. Breach of promise. Goddard v. Gray.*(1) Action for breach of promise of marriage; verdict £700, and motion for a new trial, because damages excessive, the defendant being on a salary of £200 a year. Lord *Mansfield*.—"No time being fixed for the marriage, no action could be brought until he had put himself in a situation not to be able to perform his promise.—It is impossible for the court to control the jury in a case properly left to them. If the jury think a man ought to make satisfaction for an injury he has done, his not being able to pay is no reason for setting aside the verdict."

So, in *Johnston v. Caulkins.*(2) Action on a promise of marriage. Plea, general issue, and verdict for plaintiff, with \$1000 damages. Motion for a new trial, and it was urged on the argument that the damages were excessive. A new trial was granted upon another ground, *Lansing*, Ch. J., dissenting: his opinion contains the only remarks of the court upon the point of excessive damages, with which, it is to be presumed, the other judges concurred. "Something was said," observes the chief justice, "respecting the damages which were alleged to be excessive. The jury are the proper judges of the damages, and though I am not prepared to say, that there is no case, however outrageous, in actions of this kind, in which the court will not interpose to correct a verdict on that ground, I think it ought certainly never to be done, unless the inequality between the injury and compensation is extreme. I am not perfectly satisfied with the verdict; I think less damages would have been nearer the line of just retribution; but

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(1) M. T. 1776. B. R.

(2) 1 Johns. Cas. 116.

considering all the circumstances, I do not think them extravagant.”(1)

In a recent case, however, *Gough v. Farr*,(2) where a doubt arose whether the breach of promise was sufficiently proved, and a verdict was taken, reserving to the defendant the right to move for a nonsuit, the jury gave £250 damages. A motion for nonsuit was afterwards made and refused, but a rule *nisi* was granted for a new trial, for excess of damages.

So in *trover*, *Ayer v. Bartlett*,(3) for machinery. Evidence was produced at the trial by the plaintiff, tending to show that the value of certain machinery, for which the action was brought, exceeded \$1900; and by the defendant, that it was sold at the sheriff's sale for as much as it was worth, and that the sale was well attended and properly notified. The jury found a verdict for the plaintiff for \$1900 damages. A motion was made for a new trial, on the ground of excessive damages. *Putnam, J.*, delivered the opinion of the court. After disposing of the other point in the case, he proceeds—“The only remaining consideration is, whether the damages are excessive. The jury have found three times as much as was produced by the sheriff's sale of the goods by auction. The jury were to compensate in damages in this case, upon the principle of placing the plaintiff in as good a condition as if his property had not been taken; and there is evidence to prove that it was worth a sum exceeding the amount of the verdict, as it stood connected with the factory. It is obvious that the auction sale in parcels, could not be conclusive against the plaintiff. And although we all think that this verdict is for a larger sum than we should have given, yet we cannot say that it is against the evidence, or even the

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(1). Vide *McKie v. Nelson*, 4 Cowen, 355.

(2) 2 Car. & Payne, 631.

(3) 9 Pick. 156.

weight of evidence." The motion for a new trial must be overruled. (1)

2. But even in personal torts, where the jury find *outrageous damages*, clearly evincing partiality, prejudice, and passion, the court will interfere for the relief of the defendant, and order a new trial.

Thus, in *Clerk v. Udall*, (2) upon a trial at *nisi prius*, the jury gave excessive damages, and for this cause a new trial was granted. The second jury gave the same damages, and a second trial was moved for, and denied, because there ought to be an end of litigation; but several cases were cited, which the chief justice allowed, that where, upon the second trial, the jury have doubled the damages, a third trial had been granted.

The rule will apply to every species of personal tort. Although no case has actually occurred, it has been held, that even in *crim. con.*, formerly thought to be an exception, if the court can perceive that the jury, in their finding, were actuated by undue motives, or even under the influence of gross errors, the verdict would be set aside, as is intimated in *Chambers v. Caulfield*. (3)

In cases of *assault and battery*. *Goldsmith v. Lord Sefton*, (4) The plaintiff, a sheriff's officer, had arrested Colonel M., who immediately escaped into the defendant's house. The defendant coming home soon after, found the plaintiff there, watching Colonel M., who, however, contrived to make his escape. The plaintiff, some time after, retired to an alehouse in the neighbourhood; Lord Sefton followed him, and demanded to see his warrant. This was at first refused. Some altercation took place, and Lord Sefton held out his horsewhip, in an attitude of menace to

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(1) Et vide *McDowall v. Murdock*, 1 Nott & McCord, 237.

(2) 2 Salk. 649.

(3) 6 East, 244.

(4) 3 Anst. 908.

the defendant, who opposed his stick, which Lord Sefton took out of his hand, and threw away. For this assault the action was brought, and the jury, on a writ of inquiry, gave £200 damages. A rule *nisi* was obtained, on the ground of excessive damages. And, per *Macdonald*, C. B.—“By the whole current of authorities, it appears that we are bound to protect a party, where, by the improper warmth or worse passions of a jury, damages glaringly and outrageously great have been given against him. We cannot say what the damages ought to be, but can only send it for the investigation of another jury.” *Hotham*, Baron—“It is as much the duty of the court to protect the party from injustice of the jury, as to submit to their finding in those things which are exclusively within their province. The present verdict is such as cannot be justified. It is an insult on the judgment of the court, to suppose it a fair verdict.”(1)

So in *Jones v. Sparrow*.(2) Action of assault and battery, tried before Lord Kenyon, when it appeared in evidence, that the plaintiff, who was a servant to the defendant, after having received a slight blow from his master for impertinent behaviour, violently beat him. The jury gave a verdict for the plaintiff, with £40 damages, which the defendant moved to set aside, on the ground of excessive damages; and *Duberly v. Gunning* was relied on in resisting the motion. Lord Kenyon, Ch. J.—“It must be remembered, that, although the case of *Duberly v. Gunning* was decided after a very full discussion of the subject, the court were not unanimous in the determination. But whether rightly or not decided, that is a case *sui generis*, and cannot govern the present.” And motion granted.

(1) Vide *Grey v. Grant*, 2 Wils. 252. *Benson v. Frederick*, 3 Burr. 1345. *Durham v. Wood*, 1 Term Rep. 277.

(2) 5 Term Rep. 257. .



And in *Goldsmith v. Lord Sefton*.<sup>(1)</sup> *Thompson, B.*, mentions a case in the common pleas, where, upon a writ of inquiry for an assault, £200 damages were given, and set aside as excessive.

So in cases of *malicious prosecution*. *Chambers v. Robinson*.<sup>(2)</sup> Action for a malicious prosecution of an indictment for perjury. The chief justice allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant, of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not (as he said) that the jury were to consider it in damages, but only as a circumstance of malice. The jury found a verdict for the plaintiff of £1000. The defendant moved for a new trial, on account of the excessiveness of damages; and the court said it was but reasonable he should try another jury before he was finally charged with £1000, so a new trial was granted upon payment of costs; and a new trial being had, the same damages were given again, upon which the defendant applied to the court, who said it was not in their power to grant a third trial. The latter clause, it is presumed, after so many repetitions of the remedial power of the court, would not now be considered as law.<sup>(3)</sup> Indeed, the whole decision has been questioned.<sup>(4)</sup>

And in *Harry v. Watson*,<sup>(5)</sup> where £3000 had been given in an action for a malicious prosecution, the court of common pleas, on a motion to set aside the verdict for excessive damages, said, they had the power of granting a new trial, and inclined to grant it in this case; but the plaintiff agreed to accept £1500, and so the matter ended.

So in actions of *slander*. It is worthy of remark, that this action in which the courts evince so strong a disin-

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(1) 3 Anst. 808.

(2) 1 Str. 691.

(3) Vide 4 Burr. 2108.

(4) 2 Wil. 249.

(5) 4 Term Rep. 659, *in notis*.

clination to interfere on either side, has proved to be the first regularly reported case in the whole class of torts, where the court granted a new trial on the ground of extravagant damages, and that too, after a trial at bar.

In *Wood v. Gunston*.(1) Wood brought an action against Gunston, for speaking scandalous words of him, and, amongst other words, for calling him *traitor*, and obtained a verdict against him at bar, with £1500 damages. Upon the ground that the damages were excessive, and that the jury favoured the plaintiff, the defendant moved for a new trial. *Glyn*, Ch. J.—“It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial and not an arbitrary discretion; and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them; and it is for the people’s benefit that it should be so; for a jury may sometimes, by indirect dealings, be moved to side with one party, and not be indifferent betwixt them. But it cannot be so intended of the court; wherefore let there be a new trial.”(2)

So in actions for *false imprisonment*, new trials have been had, because of outrageous damages. As

In *Ash v. Ash*.(3) Action for false imprisonment, and verdict £2000 damages, although the plaintiff had been confined by her mother only two or three hours. A new trial was granted on account of the excessiveness of the damages. And by *Holt*, Ch. J.—“The jury were shy of giving their reason for their verdict, thinking they had an absolute power to find it as they pleased. This is a mistake, for the jury are to try the cause with the assistance of the judge.”

So, in a recent case in the English common pleas, *Price v. Severn*.(4) Action for false imprisonment. The plain-

(1) *Styles*, 486.

(2) *Vide supra*, 3. 7.

(3) *Comb.* 357.

(4) 7 *Bing.* 316.

tiff, claiming relationship to the defendant's wife, importuned him for pecuniary relief, until he was obliged to warn him off his premises. He still continued his importunities, and having refused to quit the premises, the defendant directed a constable to take him into custody, and the plaintiff was taken to an inn for the night. Next morning he was brought to the defendant, and after some little conversation, said he must have some money. The defendant went away, and returned in a few minutes with two sovereigns, which he told the plaintiff he might take, or go before a justice. The plaintiff consented to take the money, but said he must have something for the keep of his horse. The defendant gave him half a crown, and directed the butler to furnish some refreshment. The jury gave a verdict for the plaintiff £100 damages. The defendant obtained a rule *nisi*, on the ground that the damages were excessive. *Tindal*, Ch. J.—“I am as little disposed as any man to interfere with the province of a jury, and I should not be induced to send a case down again for excessive damages, except where those damages are enormous and disproportionate. I consider them such in this case, on account of the limit which the plaintiff himself put on his demand in the first instance.” And after recapitulating the facts, his lordship concludes—“It seems to me, that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for £100, as we cannot but see on the evidence of the plaintiff himself, is far beyond what he merits. The case, therefore, must go before another jury.” The other judges concurred, and the rule was made absolute.

So in the supreme court of this state. *McConnell v. Hampton*.<sup>(1)</sup> Action for false imprisonment. The defendant was commander of the army of the United States

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(1) 12 Johns. Rep. 234.

at Burlington, when the plaintiff, a private citizen, was arrested and tried by a court martial. The plaintiff came to the defendant to make some communication relative to the enemy, and the defendant said the communication was false, and ordered the plaintiff to be taken to the guard-house. The plaintiff was confined from Tuesday until Sunday, and lay on the floor of the guard-house without any bed, but was allowed to procure his own provisions and rations of a soldier, and was permitted to speak to others, in the presence of the officer. The jury found a verdict for the plaintiff for \$9000 damages. A motion was made to set aside the verdict, and for a new trial, on the ground of excessive damages. The court, per *Thompson, J.*, after reviewing the testimony—"It must strike every one at first blush, that the damages given by the verdict are unreasonable, and indeed outrageous. It is not, therefore, a case of the mere assessment of damages, upon an undisputed state of facts, but where different men might very honestly draw different inferences, as to the motives which influenced the conduct of the defendant. To refuse a new trial, would, in effect, be saying, that a new trial ought never to be granted in actions of this description." New trial granted. Van Ness, J., dissenting.(1)

So in actions on the case, *ex delicto*. Thus, in *Pleydell v. The Earl of Dorchester*.(2) Action on the case for diverting the plaintiff's water-course. The jury gave a verdict for £3000, which this court, on a former day, set aside, upon motion as being excessive, and not warranted by the evidence—it being a mere question of the deterioration of property, and, therefore, not like cases of personal injuries, as actions for adultery, slander, and the like. The court said, that having taken this matter into their consideration

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(1) Et vide 3 Monroe, 145. 2 Southard, 847.

(2) 7 Term Rep. 525.

since it was last mentioned in court, and having referred to several precedents, particularly one in Sty. 466, by which it appeared to have been the practice, in such cases, to let in the defendant to a new trial, upon the terms of the former verdict; standing as a security, in the mean time, for the damages, which might be given upon another trial, they thought the rule was founded in justice and convenience, and fit to be enforced, not only upon this, but upon all future occasions of the same kind.(1)

3. In personal torts and actions sounding in damages, the court will refuse new trials for *smallness* of damages, for the same reasons that prevail on questions of excessive damages. To entitle the application to succeed, the jury must have clearly manifested an abuse of their power. Thus,

In *Marsham v. Buller* or *Bulwer*.(2) Action of trespass; the jury found for the plaintiff, and gave half a farthing damages. *Richardson*, in arrest of judgment, said, that the damage which the jury gave ought to be valuable, and there is no such coin as half a farthing. *Doderidge*, J., said to Richardson—"Your purse is full, but if you were at Oxford, you would get a draught of beer for half a farthing. *Haughton*, J., said, "You may have *feri facias* and levy half a farthing by an egg." So the plaintiff had judgment.

Lord *Kenyon*, in *Duberley v. Gunning*,(3) recognises the principle—"If we can set aside a verdict in such a case as this, for excess of damages, I presume we shall be equally warranted in so doing where we think the damages too small; and yet in Lord *Strafford's* case, although the court thought that one shilling damages

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(1) Ante, *Cutton v. Barnes*, Litt. Sel. Cas. 136.

(2) 2 Ro. Rep. 21. Cro. Jac. 458. Jenk. 335.

(3) 4 Term Rep. 651.

given against him were much too small, they did not think themselves warranted in granting a new trial on that account, because they had no rule to go by.”(1)

In slander the court have refused to interfere on this ground. In *Lord G—r v. Heath*.(2) Action upon the statute of *Scan. Mag.* for the following words spoken of the plaintiff, “G—d d—n my Lord G—r, he is a rogue, and all on his side are rogues; if the mob would stand by me, I’d drive them all, or lay the town in heaps.” The words were proved upon the trial, notwithstanding which the jury found only 12*d.* damages. *Darnal*, for plaintiff, moved to set aside the verdict by reason of the smallness of the damages; but not being able to produce any instance of a verdict being set aside merely for that reason; though for excessive damages, verdicts have been frequently set aside, and in point of reason there is the same cause for setting aside one as the other, yet as the difference had been always taken, and practice long settled, the court said they would make no rule.

So in *Hayward v. Newton*.(3) An action was brought for these words, spoken of the plaintiff as a wine merchant—“You are a rogue, villain and rascal, and fill by short measure,” and the jury gave twenty shillings damages; and though it was thought a hard case, yet the court said it has always been denied to set aside a verdict for smallness of damages, and therefore denied it in this case. *Quære tamen?* Is it not within the reason of the rule setting aside a verdict for excessive damages?(4)

In cases of *malicious prosecution*, the court have refused to set aside the verdict on this ground, as in *Barker v. Dixie*.(2) Though the court, in that case, held, what

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(1) Et vide Bull, N. P. 27. (2) Barnes, 445. (3) 2 Str. 940.

(4) Vide *Marsh v. Bower*, 2 W. Blacks. 851. 2 Burr. 664. 5 Price, 334.

(5) 2 Str. 1051. Supra, p. 347.

it is presumed would not, construed strictly, be now regarded as law, that they could not grant a new trial on the account of the smallness of the damages. The court were evidently driven into this remark, by a process of reasoning limiting the extent of their remedial power to cases where *attaint* would have lain; forgetting the large discretion with which it clothes them, extending to all classes of cases, and which, on all other occasions, they uniformly assert. It is the only modern instance in which the court have suggested a doubt of their power.

In *Mauricet v. Brecknock*,<sup>(1)</sup> it is laid down, as a general rule, not that the court cannot, but that they will not, set aside a verdict, in an action for a tort, on account of the smallness of the damages.<sup>(2)</sup> This is not intended to apply to extreme cases. They form an exception.

Wherever, therefore, the jury transcend their limits, and suffer themselves to be influenced by caprice, gross partiality, or passion, it presents a proper care for the interference of the court, who will correct the perversity of the verdict, whether it appears in the shape of damages, or a finding intended to avoid damages entirely, and so to defeat justice. <sup>(3)</sup>

We have had occasion to notice a salutary application of this rule, in a recent case in England, *Levi v. Milne*,<sup>(4)</sup> where, for a gross libel, the jury would have given the plaintiff one shilling; but that costs would have followed the verdict. *Gasalee, J.*, observes—"It is impossible to read this publication, without seeing its libellous tendency. The name given to the plaintiff is one commonly employed by the lower orders, as a term of reproach to persons in his station. The case in *Burrow*,<sup>(5)</sup> does not lay it down as a general rule, that a new trial shall never be granted,

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(1) *Supra*, p. 411.

(2) 2 Doug. 509.

(3) Vide "Perverse Verdicts," ante, p. 421.

(4) 4 Bingham, 195. *Supra* p. 123.

(5) *Burton v. Thompson*, 2 Burr. 661.

where it is probable the damages may be small. In that case, the jury found for the defendant; and Mr. Justice *Foster*, who tried the cause, reported that the charge was proved, but the injury was so inconsiderable, that half a crown, or even a much smaller sum, would have been sufficient damages. And it was for this reason, and not the probable smallness of the verdict, in the event of a new trial, that the court denied the motion."

The case of *Bacot v. Keith*,<sup>(1)</sup> already cited, strongly recommends the rule. 'The jury, in so aggravated a case as the shattering of the plaintiff's arm with buck-shot, having rendered a verdict with only one dollar damages, against the man who could be guilty of so atrocious an assault, furnished an example of that partiality and prejudice, to which the courts constantly refer as an exception to the general rule of not granting new trials in personal torts.'<sup>(2)</sup>

In Virginia, it appears, the rule at common law was held so strictly against a motion of this kind, as to require the interposition of a statute.<sup>(3)</sup> The present practice there, is thus laid down, illustrated by an example in slander, the action of all others requiring some liberality of opinion in motions for new trials.—"When a new trial is granted for such cause, it is not necessary to state on the record the grounds for awarding it, since it will be presumed that the order of the court upon a subject which the statute has put within its jurisdiction, was correct, unless the contrary appeared." In *Rixey v. Ward*,<sup>(4)</sup> for slander, the jury assessed the damages at \$50. On motion of the plaintiff, on the ground of the smallness of the damages, for reasons

(1) 2 Bay, 466. Ante, 373. Et vide Johns. Cas. 255. 9 Ibid. 36. 2 Cowen, 479. Ante, "Verdict Against Evidence," Chap. XI.

(2) Et vide N. C. Law Rep. 276.

(3) Vide 1 Rob. Prac. 378.

(4) 3 Randolph, 52.



appearing to the court, to be sufficient evidence of the perversity of the jury, the verdict was set aside and a new trial ordered. At the second trial the jury gave \$500 damages, and the court rendered judgment on the verdict, from which the defendant appealed, and by the court of appeals, the judgment was affirmed.

From the preceding cases, it is clear the reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class, there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury, governed by a sense of justice. It is, indeed, one of the principal causes in which the trial by jury has originated. From the prolific fountain of litigation, numerous cases must daily spring up, calling for adjudication for alleged injuries, accompanied with facts and circumstances affording no definite standard by which these alleged wrongs can be measured, and which from the necessity of the case must be judged of and appreciated by the view that may be taken of them by impartial men. To the jury, therefore, as a favourite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining those facts and circumstances, and valuing the injury, and awarding compensation in the shape of damages. The law that confers on them this power, and exacts of them the performance of the solemn trust, favours the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties, in the examination of heterogeneous matters of fact, where no criterion can be supplied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose.

4. But in actions where, by reason of the agreement of the parties, or from other causes, a reasonably certain measure of damages is afforded, no such latitude is allowed the jury, and the court will look into the circumstances, and grant or refuse a new trial, or correct the verdict themselves, according to the justice of the case.

The distinction is taken in *Russell v. Ball*.<sup>(1)</sup> One of the grounds, moved upon for a new trial, was the smallness of the damages. *Per Curiam*.—"Attaint will not lie against jurors for finding too small damages. Where a demand is certain, as by promissory note, the court will set aside a verdict for too small damages, but not where the damages are uncertain, as in this case for curing a wound.

In *Thelluson v. Fletcher*.<sup>(2)</sup> On a rule to show cause why the inquisition, on a writ of inquiry, in an action on a policy of insurance, should not be set aside. The plaintiff declared on a policy on goods on board divers vessels. The defendant had underwritten £300, and having suffered judgment by default, the jury, on the writ of inquiry, assessed the damages at that sum, without any proof of the amount or value, or any evidence whatever, except of the defendant's handwriting to the policy. Motion to set aside the inquest. *Buller, J.*—"It does not follow, because a writ of inquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or a promissory note, nothing but the instrument is to be proved before the jury, the sum being thereby ascertained. Though even in cases where there is no necessity for a writ of inquiry, that proceeding is of use when the plaintiff goes for interest, which the jury assesses in the name of damages." And the rule was discharged.

The cases of this kind, in which the courts are called

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(1) *Barnes*, 445.

(2) 1 *Doug.* 315.

upon more frequently to interfere, on the ground of damages, are in covenant, where the parties provide a penalty, not as liquidated damages, but denoting the extent to which they are, in any event, to respond in damages. When, in such cases, the jury find the penalty instead of the actual damages, the court will give relief by setting aside the verdict, and sending the cause to another jury. But the principle has been tested, rather by verdicts sought to be set aside for *smallness*, than excess of damages. Thus,

In *Astley v. Welden*.<sup>(1)</sup> Action upon an agreement between the parties for theatrical performances, binding each other to the fulfilment under a penalty of £200. The jury found a verdict with only £20 damages, but liberty was reserved to the plaintiff to enter a verdict for £200, if the court should be of opinion that the sum of £200, mentioned in the agreement, was to be considered in the nature of liquidated damages. A rule *nisi* having been obtained, the court refused to consider it a case of stipulated damages, and therefore discharged the rule, observing—"There is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger. In this case, it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another, that he shall recover the penalty; the concluding clause applies equally to all the covenants. If any thing is to be collected from the form of this declaration, it should seem that the plaintiff meant to sue only for the damages actually sustained."<sup>(2)</sup>

So in *Dennis v. Cummins*.<sup>(3)</sup> Action of debt upon an

(1) 2 Bos. & Pul. 346.

(2) Vide *Ponsonby v. Adams*, 6 Brown's Parl. Cas. 470. *Fletcher v. Dyche*, 2 Term Rep. 32. *Lowe v. Peers*, 4 Burr. 2225. *Wildbeam v. Ashton*, 1 Campb. 78.

(3) 3 Johns. Cas. 297.

agreement with the sum of \$2000, to be forfeited in case of a breach. And the question submitted to the court was, whether that sum was to be considered in the nature of a penalty or as damages liquidated, and agreed on between the parties to be recovered against the party in default. *Thompson, J.*, delivered the opinion of the court.—“This is a case of strict penalty, and for which there does not appear to be any equivalent to the other party. To consider this \$2000 as the measure of damages in the case, would be excessive and unreasonable in the extreme. We are therefore of opinion, that it must be viewed only in the nature of a penalty, and that the plaintiff ought to assign breaches under the statute, and assess the damages by a jury.”(1)

But where the penalty is clearly in the nature of stipulated damages liquidated by agreement, and the jury find the full amount of the penalty, the verdict will not be disturbed. As in *Hashbrouck v. Tappen*.(2) Action of covenant upon an agreement by the defendant to convey, and in case of failure, to pay \$500. The jury found a verdict for the whole penalty. The defendant, upon an exception, brought the question before the court, who sustained the verdict, saying, “There was no question upon the trial, but that it was a case of stipulated damages. The agreement, with respect to that, is too explicit to admit any doubt. The parties bound themselves to each other in the sum of five hundred dollars, which, in the language of the covenant, they consented to fix and liquidate as the amount of damages to be paid by the failing party, for his non-performance to the other. The evidence, as appearing on the bill of exceptions, shows that the plaintiff was always ready, and did every thing on his part required by the agreement; and that the defendant did not, and could not perform on his

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(1) 2 Term Rep. 34. 8 Johns. Rep. 392. 9 Johns. Rep. 115.

(2) 15 Johns. Rep. 200.

part, by reason of certain incumbrances on the land which he had covenanted to convey to the plaintiff.”(1)

Nor will the court set aside the verdict for an amount, either too great or too small, if it might have been prevented by a due exercise of care on the part of the defendant. Thus,

In *Brown v. Tanner*,(2) the jury included the expenses of an award which had been made, but after the defendant had revoked his submission. The verdict was in an action of assumpsit, brought on the revocation of the submission. A motion was made to set the verdict aside, on the grounds of its being illegal, and excessive ; but the learned judge’s report having been read, their lordships held, that the error in amount of the damages ought to have been mentioned to the judge at the trial ; and it ought not to be made the ground of the great expense of a new trial, that the verdict was taken by mistake for 30s. or 40s. too much ; and the rule was refused.

The rule is further illustrated in the *alternative* which is sometimes presented to the parties, to render a new trial unnecessary, by reducing the damages, as in *Evertson v. Sawyer*.(3) Action for use and occupation of a fulling mill and carding machine. The presiding judge charged the jury, that if they were satisfied that the relation of landlord and tenant existed between the parties, to allow such sum, by way of rent, as to them it should appear the premises were worth ; that the plaintiff was entitled to recover rent only for the space of fifteen months. The jury found a verdict for \$324.37, being fifteen months’ rent, at \$200 per annum, and the interest of same. The case came up on exceptions to the judge’s charge ; and, per *Savage*, Ch. J., who delivered the opinion of the court—

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(1) Vide 3 Term Rep. 592, *in notis.* 1 Esp. N. P. Rep. 53.

(2) 1 Car. & Payne, 651.

(3) 2 Wendell, 507.

"According to my views of this case, I see no necessity for a new trial, to do justice between the parties. The judge, in my judgment, was correct, in the principles he laid down. 'The only error is, that the plaintiff has recovered for one quarter of a year too much. A new trial must be granted to correct this error, unless the plaintiff agrees to deduct the three months' rent and interest from the verdict."

Nor, where the jury have omitted some small item to which the plaintiff in strictness may have been entitled, especially if their attention was not drawn to it particularly.

As in *Hagar v. Weston*.<sup>(1)</sup> Action in assumpsit, tried upon the general issue, before Parker J., and a verdict for the plaintiff, who, as appears from the judge's report, objected, and moved for a new trial, on the ground that the jury allowed interest on two certain notes declared upon, only from the date of the writ; whereas interest ought to have been allowed from the date of those notes. It was contended, that although the difference in the amount was small, it was yet important, because the jury having returned less than fifty dollars, the plaintiff was by the statute subjected to the payment of costs. *Parsons*, Ch. J.—"As the facts are stated, it appears to us equitable, that interest should have been allowed from the negotiation of the notes. 'This the jury have not done, probably through inattention. But we cannot say the verdict is against law or against evidence. It appears, that had interest been allowed by the jury from the negotiation of the notes, the plaintiff would have been entitled to full costs, which she cannot now have. We do not inquire into the consequences of verdicts, as they may relate to costs. The costs are regulated by the verdict, and not the verdict by the costs."

In *Walker v. Smith*, cited above, the jury rendered only

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(1) 7 Mass. Rep. 110.

the principal sum without interest. A new trial was moved for on that ground, but refused.(1)

So in *Bourke v. Bulour*.(2) Upon a motion for a new trial, it appeared that the plaintiff had recovered a verdict in this case against the defendant, for £230 sterling, for a breach of contract entered into, for delivery of flour and tobacco. The writing was in the nature of a note, or memorandum, signed by the defendant for £47,410 old currency. The jury, in estimating the damages, gave the value of the £47,410 old currency, at the time the contract was entered into, (1780,) agreeably to the scale. A new trial was moved for, because the jury had given less damages than the plaintiff was entitled to. *By the Court*—"The jury, in this case, seem to have exercised a very proper discretion, by considering this rather in nature of an assumpsit for a debt due, than of a covenant for a specific performance. They have given the plaintiff what the defendant appears really to have fallen in his debt; though, taking it upon the contract, they might have given larger damages. We do not think it proper to set aside a verdict because the damages are small, in order that a plaintiff may have another chance of getting more."

But when the jury, through mistake, or undue motives, return a much less amount than in justice they ought, there being in the nature of the case a reasonable test by which to measure the damages,(3) the court will set aside the verdict. Thus,

In *Parr v. Purbeck*.(4) Action of covenant for non-payment of rent, reserved upon a lease for years. There was judgment against the defendant by default; and upon a writ of inquiry executed, the jury gave the plaintiff but

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(1) 1 Wash. C. C. R. 202.

(2) 1 Bay, 49.

(3) Et vide *Hopkins v. Meyers*, 1 Harper's S. C. Rep. 56. 1 S. C. Con. Rep. 365.

(4) 8 Mod. 196.

one shilling damages, though he proved that the defendant owed him £150. Motion to set aside the verdict, on the ground of the smallness of the damages. *By the Court*—"It is admitted that in covenant, where damages are to be recovered, the jury, upon a writ of inquiry, are the proper judges of the quantum of the damages, and for that reason the court will not set aside their inquiry, where they give small damages; but it is otherwise where the covenant is for payment of money, and the sum is ascertained, because in such cases the sum being certain, the jury cannot lessen the damages, and this is the constant difference in such cases. It is the same as if an assumpsit had been brought for money upon a note under hand, for there the jury cannot mitigate the damages; if they do, the court will set their verdict aside."

So, in *Earl of Peterborough v. Sadler*,<sup>(1)</sup> a trial being concerning the value of improvement made by Sadler, and a jury of farmers having given £200 damages, which was thought excessive, a new trial granted, and a jury of gentlemen ordered, who only gave £40; whereupon a new trial was moved for, for Sadler, because of smallness of damages. *Holt*, Ch. J., said, that one must not always conclude, because the court grants a new trial, that they are satisfied that the first verdict was bad; but it is often because the thing may require a re-examination. A rule was granted.

And in *Woodford v. Elades*.<sup>(2)</sup> On a contract for stock between the plaintiff and J. S., they each deposit £200 in the hands of the defendant; and J. S. not performing his agreement, the plaintiff sued for the deposit, had judgment on demurrer, took out a writ of inquiry, and proved his case. But the jury, on a motion that the defendant could not pay out the money without consent of both parties, gave

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(1) 12 Mod. 348.

(2) 1 Str. 425.



*Id.* damages, which was now set aside; the court saying, that the rule of not setting aside verdicts for the smallness of the damages did not extend to this case, where the jury mistook in point of law; and the chief justice said, he knew no reason why the court should not interpose in the other case.

So, in *Markham v. Middleton*.<sup>(1)</sup> The defendant owed the plaintiff £333 for an apothecary's bill, and suffered judgment to go by default; and the plaintiff's attorney, on executing the writ of inquiry, produced the foreman, who had told him he could prove the bill; but when the jury was sworn, he declined giving any evidence; upon which the sheriff was desired to adjourn, which he thought he could not do, and the jury thereupon found one penny damages only. The court thought it hard the plaintiff should be paid so large a debt with one penny, as he would be if this verdict stood, or that his case should be worse for the defendant's letting judgment go by default; for, had he pleaded, the plaintiff could have suffered a nonsuit. And, therefore, they set aside this, and ordered a new writ of inquiry.

And in *Taunton Manufacturing Company v. Smith*.<sup>(2)</sup> Case for a breach of a special contract, in which the defendant undertook to bleach cotton cloths for the plaintiffs. At the trial, the superintendant of the company's works testified, that the defendant omitted some of the processes requisite for good bleaching, and estimated the damage sustained by the company, in regard to one species of goods, at \$1652. His testimony was corroborated by that of other witnesses on the part of the plaintiffs. The defendant offered no evidence. The jury returned a verdict for the plaintiffs for \$337. The plaintiff moved for a new trial, on the ground that the damages were too small. *Parker*,

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(1) 2 Str. 1259.

(2) 9 Pick. 11.

Ch. J., delivered the opinion of the court.—“We think there is great reason to believe, that the jury laboured under some mistake in the estimation of damages, having given not more than one quarter part of what, according to all the evidence, the plaintiffs sustained. It is objected, however, that verdicts cannot be set aside on account of the damages being too small ; but we are satisfied that this is a mistake. It is a power rarely exercised, especially in actions for personal wrongs, such as slanders, batteries, and the like. But where the foundation of the action is a breach of contract, and the damages are capable of estimation, if there is a glaring deficiency, justice requires that the case shall be revised ; and judging from the evidence reported, this appears to be a case of the kind.” And new trial granted.(1)

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(1) Et vide *Birkbeck v. Burrows*, 2 Hall's Rep. 51. *White v. Green*, 3 Monroe, 157.



## CHAPTER XIII.

### FOR NEWLY DISCOVERED EVIDENCE.

It sometimes happens that after the utmost vigilance, and the best directed efforts of the party and his counsel, the true merits of the case have not been submitted, by reason of the absence of facts, which, had they been known and introduced, would have given a different complexion to the case. Or it may be that facts may have occurred subsequently to the trial, which tend to present the point at issue differently, and show that the verdict, if suffered to remain, would operate unjustly. When such a case happens, and the court becomes satisfied that, to promote the ends of justice, an opportunity ought to be allowed for the introduction of the new testimony, they will furnish an opportunity by setting aside the verdict, and directing a new trial. But to prevent abuse, practising with the witnesses, careless preparation in the first instance, and harassing the court with unfounded applications, the party moving on the ground of newly discovered evidence is required to conform himself to very strict regulations. The negligent are to expect no indulgence, and applications, founded on light circumstances, will be promptly denied. Nothing but a clear case of injustice, occasioned by means beyond the control of the party, and the certainty of correcting it, by those means since brought to light, and placed within the reach of the applicant, will answer the purpose. There is, therefore, no grounds on which motions for new trials rest, better ascertained or more clearly defined, so as to guard against practise and imposition, than that of newly

discovered evidence. By a series of well digested decisions, it is settled that the evidence, which would warrant the court to set aside the verdict, must be new, material, and not cumulative, and that the party applying has used reasonable diligence. The essential requisites are laid down with brevity and perspicuity in *Porter v. Talcott*,<sup>(1)</sup> by Mr. Justice *Woodworth*.—"The application for a new trial," says he, "ought to be granted, on the ground that there has been reasonable diligence, that the new evidence is material, that it has been discovered since the trial, and is not cumulative."<sup>(2)</sup>

1. The evidence that will induce the court to set aside the verdict, and grant a new trial, must be new, that is, not used on the former trial, but discovered newly, or subsequently to the trial, and must be material to the point at issue, so as probably to produce a different result, and the application must be accompanied with sufficient evidence of previous diligence.<sup>(3)</sup> The *newness* and the *materiality*, although perfectly distinct, are so intimately connected as to require to be considered together, for the better illustration of the rule. But first, as illustrative of the rule generally.

In *Ewing v. Price*,<sup>(4)</sup> on motion for a new trial, on the ground of newly discovered evidence, it was held necessary to show four things:—The names of the witnesses that had been discovered; that the applicant has been diligent in preparing his case for trial; that the new facts were discovered after the trial, and will be important; and that the evidence discovered will tend to prove facts

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(1) 1 Cowen, 359. (2) Vide 2 Arch. Prac. 226. Gra. Prac. 511.

(3) 2 Salk. 653. 2 Mod. 245. 6 Ibid. 22. 222. 9 Ibid. 328. 12 Ibid. 584.

(4) 3 J. J. Marsh. 521.

which were not directly in issue on the trial, or were not then known or investigated by proof.(1)

And in *Moore v. The Philadelphia Bank*.(2) Action for a reward offered to apprehend a robber of the bank, and verdict for the plaintiff. A new trial was moved for, on the ground of material evidence discovered since the trial; upon which the court observes—"Motions of this kind are to be received with great caution, because there are few cases tried, in which something new may not be hunted up; and because it tends very much to the introduction of perjury, to admit new evidence, after the party, who has lost the verdict, has had an opportunity of discovering the points both of his adversary's strength and his own weakness. It is therefore incumbent on him who asks for a new trial on this ground, to satisfy the court, 1st, that the evidence has come to his knowledge since the trial; 2d, that it was not owing to want of due diligence, that it did not come sooner; and 3d, that it would probably produce a different verdict, if a new trial was granted." And upon a review of the facts at the trial, and the new evidence as submitted on the motion, the court became satisfied that the defendants failed to bring their case within the above rules, and a new trial was refused.

In *Warren v. Hope*.(3) the court laid down the following rules, to govern them in applications of this kind—"The petitioner will not be permitted to offer testimony, as to any newly discovered evidence, except that which may be stated in the petition. No new trial or review will be granted, on account of newly discovered evidence, which is merely of a cumulative nature. But the following kinds of proof may be considered as exceptions to the general rule, and furnish ground for a new trial or review. 1. That

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(1) Et vide *Daniel v. Daniel*, 2 J. J. Marsh. 52.

(2) 5 Serg. & Rawle, 41.

(3) 6 Greenl. 479.

a witness, whose testimony on the trial was in its tendency against the interest of the petitioner, has ascertained that he testified under a mistake, and that the facts do not exist, as he testified that they did. 2. When the newly discovered evidence relates to confessions or declarations of the other party, as to some influential fact, unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party. 3. Where such newly discovered evidence was directly or indirectly placed beyond the knowledge or control of the petitioner, by means of the other party, and with a view to prejudice the petitioner's cause."

In *Lessee of Ludlow's Heirs v. Park*,<sup>(1)</sup> there was a verdict for the plaintiff. The defendant moved for a new trial, chiefly on the ground of newly discovered evidence, and on this point the court observe—"In considering the motion, the court will not inquire, whether, taking the newly discovered evidence in connexion with that exhibited on the trial, a jury might be induced to give a different verdict; but whether the legitimate effect of such evidence would be to require a different verdict. In the trial of issues in fact, the court judge of the competency, the jury of the credibility and effect of testimony. But after verdict, when the motion for a new trial is considered, the court must judge, not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, a jury ought to have come to the same conclusion they have done, it would be worse than useless to grant a new trial. The effect would be to add to the expense of the litigation, and delay parties in obtaining their rights."

Again, in *Vandervoort v. Smith*.<sup>(2)</sup> Action in assumpsit on a policy of insurance, the jury rendered a verdict for a

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(1) 4 Ham. Ohio Rep. 5.

(2) 2 Caines, 155.

total loss. The defendant moved to set aside the verdict, and one of the grounds was, newly discovered evidence. On this point, *Thompson, J.* who delivered the opinion of the court, remarks—“The argument of this case has been accompanied with a motion for a new trial, on the ground of the discovery of new testimony. The testimony alluded to, is said to be a copy of the proceedings and condemnation at *Para*, against this vessel and cargo. In order to grant a new trial on this ground, it ought to appear that the testimony has been discovered since the last trial, or that no *laches* is imputable to the party, and that the testimony is material. In the present case, there are numerous objections against granting the application. It does not appear from the affidavit, that this testimony has been *discovered since the last trial*, but only that it arrived in *New-York* since that time. From the nature of the evidence, it must have been discovered as soon as the cause of the loss was known, and of course there must have been either a want of due diligence in procuring it, or if sufficient reasons for the delay could have been shown, application ought to have been made to postpone the former trial.”

So in *Doe v. Roe*,<sup>(1)</sup> a feigned issue out of chancery. The defendant, at the trial, offered in proof the record of a deed, with the affidavit of a witness endorsed upon it, but without producing the witness, or accounting for the original deed; and upon a case made, showing the judge to have overruled the testimony, and affidavits of newly discovered evidence, the defendant moved for a new trial. *Per Curiam*.—“As it is suggested, that further light can be thrown on the case, and new evidence appears to have been discovered, we think, without expressing any opinion on the merits of the case, that a new trial ought to be granted, on the payment of costs.” New trial granted.

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(1) 1 Johns. Cas. 402.

So, in *Halsey v. Watson*.(1) Motion for a new trial, on an affidavit of a discovery of new and material evidence. *Per Curiam*.—"This is a motion for a new trial, and comes before us on the ground of a discovery of material testimony since the trial of the cause. To see this, and judge whether it be material or not, it will be necessary to state the former testimony and nature of the suit." Having reviewed the testimony, to ascertain the materiality of that presented as the ground of the motion, the court proceeds—"We are to judge then, if the material evidence, as it is termed, that has been discovered since the trial, be really testimony of materiality. There is one person, who swears as to the directions given by the captain. The court are of opinion, that this is not material, so as to warrant granting a new trial. This in two points of view ; the testimony goes only to impeach the credit of what has been sworn, and not to establish any new fact. It is merely contradicting former evidence. In that point of view it is not material, nor can it be so in another, unless the defendants can go further." New trial refused.(2)

*Tuttle v. Cooper*.(3) Assumpsit on a promissory note. The defence set up was, that the note was fraudulently obtained by Robbins, the payee. Verdict for the defendant. In the trial of the next cause, it was discovered that the note account in the company's books did not contain any notes given by the company, although many in their favour. In explanation of this, one *Walsh* testified, that the company never gave any notes on their own account, except two, which were given for their real estate, and were secured by mortgage. The plaintiff moved for a new trial, because, at the time of the trial, he had no reason to suppose that the testimony of *Walsh* was not true, but, immediately after the trial, it was discovered by his counsel, and

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(1) 1 Caines, 24. (2) Vide *Morrell v. Kimball*, 1 Greenl. 32.

(3) 5 Pick. 414.



was in fact admitted by Walsh, that there was not upon the books of the company any entry, of a promissory note given by the company, in the whole course of their business. *Wilde, J.*—"The supposed falsehood of this statement is, that in the account of notes, there were no notes found against the company. Nor did Walsh testify that there were any such notes entered in the books. But suppose the jury did infer, as it is very probable they did, that other notes had been entered in the books against the company, which is not a fact, it seems to us that this mistake cannot be supposed to have had much weight, because, if the company kept an account of notes, and there was only one note given by them, it would be as probable that, that note would be entered in the note-book, as in case they had given several. Certainly, the mistake, if made, was not very material; and when we consider that the other evidence in the case is very strong in favour of the defendant, as we cannot but see that it is, we are all very clear that a new trial ought not to be granted."

So, in *Marshall v. The Union Insurance Company*.<sup>(1)</sup> This was a motion for a new trial, on the ground that new and material evidence had been discovered since the trial. The new evidence consisted of documents, from the custom-house at New-York, tending to invalidate some of the testimony given at the trial, and to show that the sale was not *bona fide*, but a mere cover, and the goods, in fact, not neutral property. *By the Court.*—"This is a rule to show cause why a new trial should not be granted, upon the ground of material evidence discovered since the trial. We are satisfied that the newly discovered evidence was not known at the time of the trial, although the defendant's counsel, upon seeing the New-York commission, which only came to hand a few days before the trial, suspected,

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(1) 2 Wash. C. C. Rep. 411.

from some parts of it, that some useful information might be collected. But this would not have been a good reason for continuing the cause. As to the materiality of the evidence, we cannot positively decide; nor, perhaps, would it be proper now to give a positive opinion about it. It may be explained, but at present it appears to have a considerable bearing upon the point on which the cause turns, and we think it ought to be submitted to a jury." Rule for a new trial absolute.(1)

And, in *Myers v. Brownell*.(2) Action in ejectment, and verdict for defendant. The plaintiff petitioned for a new trial on the ground of newly discovered evidence. The opinion contains, in detail, the facts, as sworn to by the witness from whom the newly discovered evidence was expected. *Prentiss, J.*—"To entitle a party to a new trial on the ground of new discovered evidence, it must appear that the evidence has been discovered since the trial, that no *laches* is imputable to the party, and that the testimony is material. The plaintiff swears that the testimony of Wright was wholly unknown to him at the time of the trial, and Wright himself says, that the facts within his knowledge were not communicated by him to any one until after the trial. The evidence, therefore, appears to be new discovered, and we see no ground for imputing *laches* to the plaintiff. With respect to the materiality of the testimony, there appears to be as little doubt. It is testimony to the declarations of the defendant himself, as to the manner in which the mortgage was lodged in the town clerk's office, and the purposes and objects for which it was left there. The new discovered testimony shows that the defendant explicitly declared that the deed was left with directions not to record it, and the reasons why such direc-

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(1) Vide *Hernandez v. Garctage*, 16 Mart. Louis. Rep. 419.

(2) 2 Aiken, 407.

tions were given. No objection is made to the credibility of the witness, and, on the whole, we think that a new trial ought to be granted."

So, also *Jessup v. Cook*.<sup>(1)</sup> This was a rule to show cause why a new trial should not be had, on the ground that defendant had discovered new and important evidence since trial. It was an action of assumpsit; plea, general issue, and verdict for plaintiff. *Boudinot, J.*—"As at the trial both parties adduced evidence to this particular point, I think it would be introducing a new rule, and establishing an exceedingly bad precedent, to set aside the verdict and grant a new trial, because one party has since discovered evidence, which he thinks entitled to more weight than any which he had produced at the trial. The jury may very probably have thought, that all parol testimony ought to be disregarded, when set in opposition to the continued and deliberate acts of the defendant himself; and I cannot bring myself to dissent from this doctrine. If the law were established, according to the views of the defendant, not one verdict in ten would stand. Some corroborating evidence may always be found or made, and in deviating from the rules by which courts have heretofore been guided, the trial by jury would become the most precarious of all trials. I am therefore against the motion." Rule discharged.

In order to succeed in the application, it appears to be necessary, that the party should mention the witnesses by name, and what he expects to prove, and that either the witness himself should state on oath the evidence he can give, or that the party should add his own belief to the statement made by the witness. Thus, in *Richardson v. Backus*,<sup>(2)</sup> action of slander. Upon a writ of inquisition, the jury assessed the plaintiff's damages at \$600. After

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(1) 1 Halst. 434.

(2) 1 Johns. Rep. 59.

notice of executing the writ of inquiry, and before the jury had actually assessed the damages, the defendant discovered material evidence, before unknown to him, and which, he was advised, would fully justify the speaking the words charged in the declaration. The affidavit further stated, that the evidence since discovered would prove the truth of the words spoken; but it did not mention the names of the witnesses, nor the particulars of what he expected to be able to prove by them. *Per Curiam*.—"We think that the affidavit of the defendant ought to have disclosed the names of his newly discovered witnesses, as well as what he expected to prove by them. This would serve for a check against the abuse of general affidavits, after a trial. Let the proceedings, therefore, be stayed until the first day of the next term, that the defendant may have an opportunity, if he thinks proper, to amend his affidavit."(1)

And in *Shumway v. Fowler*,(2) action of trespass on the case, for debauching the plaintiff's daughter, and a verdict found for the plaintiff for \$1025. The plaintiff's daughter was a witness on the part of the plaintiff. *Shepherd*, for the defendant, moved to set aside the verdict, and for a new trial, on the ground of newly discovered evidence. He read affidavits, stating, that since the trial the defendant had discovered a material witness, who told the defendant's attorney, that before the connexion between the defendant and the plaintiff's daughter, he, the said A. B., had criminal connexion with her, and also informed him, that another young man had told him, that he had previously had connexion with the plaintiff's daughter; and that the defendant also expected to prove the same thing to have taken place between her and another person. The court having denied the motion, on the ground of discrediting the witness, conclude—"There is another objec-

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(1) Vide 3 Marshall, 166.

(2) 4 Johns. Rep. 425.

tion to the affidavit in this case. It states merely, that the persons mentioned had told the party what they could say. There can be no reliance on such declarations; nor could the persons, at the trial, be obliged to answer whether they ever had such criminal connexion with the daughter. The motion must be denied."

So, in *Denn v. Morrell, and others*, (1) in ejectment, and verdict and judgment for plaintiff. The defendants moved for a new trial, upon the ground of newly discovered evidence. The affidavit of Cannon, one of the defendants, set forth the particular facts, which the defendants expected to prove; and further, that upon a new trial, the deponent would be able to prove the facts upon which he relied, by Frederick Dibblee, who would testify that the lessor of the plaintiff had, at a certain period long since elapsed, executed a deed in his presence, either a quit claim or a release, (the witness could not remember which,) whereby all the interest of the lessor in the premises was conveyed to one Maria H. Williamson. That said deed was delivered in the presence of Dibblee, but had never been in the possession of the deponent, and as he was informed, and verily believed, it had never been in the possession of the other defendants, but had been lost or mislaid in the lifetime of the said Maria. Upon this state of facts, the court held, that the party moving for a new trial upon the ground of newly discovered evidence, was bound to produce the affidavit of the witness, from whom such evidence was to come, setting forth the facts, or show that such affidavits could not be obtained. In the present case (they said) there was no ground to suppose that Dibblee would give the testimony detailed in the affidavit, except from the belief of the deponent, and the application was therefore refused.

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(1) 1 Hall's Rep. 382.

So, in *Sheppard v. Sheppard*.<sup>(1)</sup> Trespass, and verdict for the plaintiff. The defendant moved to set aside the verdict on three grounds. One was, the discovery of new and important evidence, not known to the defendant at the former trial. *Ford, J.*—"The newly discovered witness, (Irwin,) is to swear, as is said, that he told the plaintiffs there was an execution levied on the property before he gave them the bill of sale. The evidence of it is, that a Mr. Harman swears he has heard Irwin say so. Facts newly discovered, ought to be laid before the court in the shape of legal evidence, and not hearsay. Many men say things which they dare not confirm under oath. We ought to have more substantial ground for setting aside a verdict, than a hearsay. I do not know a case where it was ever allowed, but there are many to the contrary." A new trial was refused.<sup>(2)</sup>

2. The party applying on the ground of newly discovered evidence, must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for negligence, have known and produced it, he will not succeed in his application.<sup>(3)</sup> This is a well settled and comprehensive rule, running through all the cases on applications of this kind, and entering essentially into the practice of all courts, proceeding on the principles of the common law. In equity new trials are awarded on different grounds.<sup>(4)</sup>

Thus, in an *Anonymous* case.<sup>(5)</sup> *Per Curiam*.—A new trial is never granted for want of evidence, whereof the party was apprized, and which he might have had at the trial.

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(1) 5 Halst. 250.

(2) Et vide 1 S. C. Con. Rep. 69. 143. *Evans v. Rogers*, 2 Nott & M'Cord, 563.

(3) Vide "Surprise," supra, 174—180.

(4) Vide 2 Atk. 319. 2 Ves. sen. 552.

(5) 6 Mod. 222.

*Watson v. Sutton*, (1) Debt against the marshal for an escape. At the trial a *reddidit se*, in discharge of the bail of the principal, and a *committitur* in execution to the marshal, were produced in evidence; and after verdict it was moved that it should be set aside, as the *committitur* was irregular; for the course of the court is, that where any one upon a render is charged in execution, there ought to be a notice thereof to the marshal, without which it were hard to charge him with escape; and the cause of giving such notice is by making an entry of the *committitur* in a book kept for that purpose by the marshal, who has an officer on purpose in the office to take notice of such entries, and it is not enough that the *committitur* be entered with the entering clerk. *Gould, J.*, laid it down for a rule, that where a man has matter of defence, and knowing thereof goes to trial, and puts the plaintiff to the charge of proving his issue, he shall never after, in respect of that matter, have a new trial. (2)

*Cooke v. Berry*, (3) cited above. The plaintiff had neglected to produce a letter at the trial, thinking the defendant had put in a sham plea. The court held that "New trials are never granted upon the motion of a party, where it appears he might have produced and given material evidence at the trial, if it had not been his own default, because it would tend to introduce perjury, and there would never be an end of causes, if once a door was opened to this."

And in *Gist v. Mason and others*, (4) on a policy. The defendants moved for a new trial, to let them into new evidence; assigning, as the reason why this evidence was not offered at the trial, a presumption that the jury, of their own knowledge, must have taken notice of the fact.

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(1) 12 Mod. 583. (2) Et vide 12 Mod. 567. 1 Salk. 373.

(3) 1 Wils. 98. Supra, 196.

(4) 1 Term Rep. 84. Supra, 197.

But per *Ashhurst*, J.—“ The defendant makes this application to the court, in order to supply his own negligence, when it was evident he was not taken by surprise at the trial. If it do not appear on the face of the policy that it is void, it ought to have been shown by evidence ; but no such evidence was offered.”(1)

And in *Hope v. Atkins*.(2) Assumpsit for the price of a quantity of barley sold to the defendant. There was a memorandum of the sale in writing. The defendant attempted to introduce parol evidence to vary the memorandum, which the judge overruled. On this ground a new trial was moved for, and an affidavit was tendered to the court stating, among other things, that the barley had been injured by a thrashing machine ; but it was rejected, as an attempt to bring forward facts, which should have been used at *nisi prius* only.

So also in *Doe v. Price*.(3) in ejectment. It became a question whether a former marriage of one of the parties, being a minor, was with the consent of her father. The jury found the fact of consent, and a verdict for the plaintiff, which the defendant moved to set aside, on affidavits stating various circumstances tending to negative the fact of consent. *Bayley*, J., (after consulting with the other judges.)—“ We think that we should be working great injustice if we were to grant a new trial in this case, because we should be giving encouragement to parties to go to trial without duly preparing themselves with evidence, even on points which they knew beforehand would be made matters of dispute. It cannot be permitted that either party shall produce just so much evidence as he thinks proper, and then stop short, and ultimately obtain a new trial, on the ground that he did on the first trial give all the evidence

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(1) Et vide 1 Str. 691.

(2) 1 Price, 143.

(3) 1 Man. & Ryl. 683.



which he then might, and has since found he ought to have given more. Indeed, it is one of the duties of the court, to guard themselves strictly against falling into the practice, or entertaining the principle of granting new trials merely for the purpose of letting in evidence, which might and ought to have been produced at the former trial. We do not say that the questions now submitted to the court are not material, and worthy of consideration ; we only say that they do not furnish grounds for granting a new trial."

In *Hollingworth v. Napier*,<sup>(1)</sup> in trover, the principal question was, whether there had been a sale and delivery of the goods, for which the action was brought, to one Kenworthy, of whom, it was proved, the plaintiff bought them, and paid part cash, and the remainder in a check of one *Peter Hyde*. At the trial of the cause, the jury, under the direction of the judge, that an order given in proof to the store keeper was a delivery, found for the plaintiff. The application now was, to set aside this verdict as contrary to law, and on account of having newly discovered that no person of the name of Peter Hyde had ever kept any account with either of the banks in New-York, and that the defendant hoped, from information, to prove a fraud in the sale. The court, by *Spencer, J.*—"It would be too loose to set aside the verdict on the mere expectation of a party's being better prepared. There has been abundant time for the defendant to lay before us the facts in the knowledge of his witnesses. This ought to be done on all applications for new trials on discovered testimony, or if omitted, good reason ought to be given for the omission. To listen to the application on this ground, would be to grant new trials, wherever the party was dissatisfied with the verdict. The facts ought to be strong ones, to induce the court to

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(1) 3 Caines, 182.

grant a new trial on the discovery of evidence, and the case should be free from laches. In the present instance, the defendant is chargeable with delay." And motion denied.

In *Palmer v. Mulligan*.(1) This was an action on the case for erecting and continuing a nuisance to the plaintiff's mills. The jury having found in favour of the defendants, application was made to set aside the verdict as being contrary to evidence, and on a discovery of new testimony, which, it appeared, might have been obtained on the first trial. The court, per *Spencer, J.*—"The second ground of the motion does not alter the case, even if the testimony could be considered as newly discovered, and that there had been no laches on the part of the plaintiffs; but, for aught that appears, one of the plaintiffs knew of this testimony, and neglected to procure it. I am averse, however, to putting it at all on that ground; the testimony discovered is wholly irrelevant and immaterial. In my opinion, the plaintiffs take nothing by their motion."(2)

In like manner, a want of recollection of a fact, which, by due attention, might have been remembered, is not such newly discovered evidence as will procure a new trial.

In *Bond v. Cutler*.(3) Assumpsit on a promissory note, and a verdict for the plaintiff. The defendant, according to the practice of the court, filed a petition for a new trial. One of the grounds was, that since the trial, the defendant had come to the knowledge of a material fact. The matter of the petition, and the answer of the court on this point, is thus given by *Parsons, Ch. J.*—"The note was supposed at the trial to be declared on as dated September 24, 1801. The defendant insisted that the date was the 4th of the same September; but the jury consider-

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(1) 3 Caines, 307.

(2) Et vide 15 Johns. Rep. 293.

(3) 7 Mass Rep. 205.

ed it as a note dated the 24th of September. Now, the petitioner says that it has come to his knowledge, that on the last mentioned day he was absent in a remote part of the district of Maine, and so could not have made the note on that day. The defendant cannot prevail on this ground, for he knew where he was on the 24th of September, 1801, as well before the trial as after; and a want of recollection of a fact which, by due attention, might have been remembered, cannot be a reasonable ground for granting a new trial; for a want of recollection may always be pretended, and may be hard to be disproved.”(1)

And in *Knox v. Work and others*.(2) Action in trespass, for breaking and entering the plaintiff's house, and committing an assault and battery upon him. On the trial the jury found a verdict against two of the defendants, \$100 damages. A rule to show cause why there should not be a new trial, was obtained upon the ground, among others, of material evidence discovered subsequent to the verdict. On this part of the case, they produced the affidavits of two persons, that the plaintiff had told them he had no resentment against Work, and had sustained no damages by him; that he was desirous they should mention it to Work, and have the matter made up, and that he would pay his own costs, if Work would pay his. The defendants likewise swore, that they were ignorant of the matters set forth in the affidavit, until after the verdict. By the court, *Rush*, President—“It is laid down as a general principle, and is said to be an established rule, not to grant a new trial on account of evidence discovered after the trial, which, by using due diligence, might have been discovered before, or which it was in his power to have been furnished with. It would be of most dangerous consequence, to suffer one party, after he had heard the

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(1) Vide supra, 187—196.

(2) 2 Binn. 563.

evidence of the other, to give new evidence. Upon this principle a new trial has been refused, where an interested witness had been examined, and not discovered till after the trial.”(1)

So in *Aubel v. Ealer*,(2) a case of reference. The referees reported for the plaintiff. The defendant applied to set aside the report, on the ground that, since the report, he had found a receipt, which had been mislaid, in full from the plaintiff. *Rush*, President, after reviewing the facts of the case, and the leading authorities on the subject of granting new trials for newly discovered evidence, concludes thus—“Whatever doubts may possibly be entertained on this subject, yet upon the whole we take the law to be as we have stated, and we have taken due pains to investigate the points. At all events, the decision of the cause this way, will tend to excite vigilance and attention, to prevent fraud and perjury, and to put an end to litigation, objects of immense value in the administration of justice. It is infinitely better that a single person should suffer mischief, than that every man should have it in his power, by keeping back a part of his evidence, and then swearing it was mislaid, to destroy verdicts, and introduce new trials at their pleasure. The idea is pregnant with alarming consequences, and would be a severe blow at the trial by jury.” And new trial refused.

In the supreme court of appeals in Virginia, in a recent case, the rule of law was recognised, where the party sought to escape from it by an appeal to equity. *De Lima v. Glassell*.(3) Action for not delivering a cargo of corn on board a brig, according to contract. The jury rendered a verdict in favour of the plaintiff, with £1900 damages. A motion for a new trial was made in the court below, and

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(1) Vide 1 Term Rep. 717.

(2) 2 Binn. 582, *in notis*.

(3) 4 Hen. & Munf. 369.

overruled, and judgment entered according to the verdict. The defendant filed a bill, and procured an injunction of the suit at law, which was dissolved upon the coming in of the answer. Evidence on both sides was taken, and the chancellor awarded a new trial, from which order an appeal was taken. *Roane, J.*—"The grounds on which the new trial was awarded by the chancellor, in this case, were, or might have been, submitted to the jury in the trial at law. It is stated, by the answer of *Stone*, that they were not only submitted, and copiously dilated on, to the jury, but also to the court of law, on the motion for a new trial, which was refused.—The appellee ought to have assigned some reason for not having exhibited his evidence to the jury; such as, that these facts came to his knowledge after the trial, or the like. Nothing of this kind being shown, as the ground of the application to the court of equity, this is, therefore, the naked case of moving for a new trial in equity, on grounds which, with ordinary diligence, the party might have availed himself of on the trial at law, and, therefore, I am for reversing the decree, and dissolving the injunction." And such was the decree of the court.(1)

In *Drayton v. Thompson*.(2) Debt on bond, assigned to one *Gabel* and *Corre*, and verdict for plaintiff, deducting four thousand pounds of ginseng. The plaintiff afterwards moved for a new trial, on the ground that he had since discovered evidence which would, on the trial, have disproved all the plaintiff's discount, except about £99 sterling; that at the trial, he was surprised by a piece of evidence, a new agreement concerning the ginseng, by which the defendant had agreed that the plaintiff should ship the ginseng to Europe, and sell it for his account, and that the nett proceeds should be credited on the bond. The plaintiff's affidavit was also produced, stating this new agreement,

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(1) Vide 4 Hen. & Munf. 405.

(2) 1 Bay, 263.

and the account sales of the ginseng; that he had given the defendant notice of it, and had the account sales in his possession, to have produced it on the trial, had he been called upon for that purpose. *Waties, J.*—"The discovery of new evidence has been rarely allowed, as a ground for a new trial, and never where the party might, by using due diligence, have procured it before. This appears to be the present case. The single question is, whether *Gabel* and *Corre*, the assignees of the bond, might have procured, at the trial, the evidence they have since discovered. It is stated, that it was then in the knowledge and possession of *Drayton*, who would have produced it, if he had been applied to, but *Gabel* and *Corre*, although apprized of the account, gave no notice of it to him, but suffered the defendant to proceed *ex parte*, and are therefore guilty of laches." And for this cause the motion was denied.(1)

The rule has been held to apply to criminal, and even to capital cases. As in *The State v. Harding*.(2) The defendant was convicted for horse stealing. His counsel moved for a new trial. One of the grounds was, that he had discovered new evidence since the trial, which, if it had been produced, would have evinced the prisoner's innocence. But the judges were unanimously of opinion, that the discovery of new evidence after trial, without proof of diligence, was not a good ground for a new trial; because, on a sufficient affidavit of the absence of witnesses in criminal, as well as civil cases, the court would always postpone the trial; that it would have a mischievous tendency to establish a precedent of this kind after a trial and conviction, as it was easy to foresee that a man, whose life was in danger, would, in every case, even to gain time, make use of a pretext of this kind to create delay; more espe-

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(1) Et vide 1 Bay, 491.

(2) 2 Bay, 267.

cially by the assistance of confederates, he might be enabled to procure unprincipled men to be witnesses, to contradict the evidence on the part of the state, and thereby defeat the ends of justice.(1)

And held in *Taylor v. Bradshaw*,(2) that even equity will not relieve a party from a judgment, upon the ground of a discovery of new evidence, after the trial at law, where it appears that the party was not vigilant in searching for, and procuring the evidence which was within his reach before the trial.

And, in *Higden v. Higden*,(3) If new evidence is discovered before the verdict is rendered, it should be submitted to the jury; and if that is neglected, a new trial will not be granted for that cause.

In *Deacon v. Allen*,(4) the court held this language, on a motion for a new trial, upon the ground of new evidence, where diligence did not appear—"If the defendant has carelessly permitted himself to remain ignorant of the best means and instruments for his defence, shall this court interfere in his behalf, and save him from the effects of his own indolence and folly? No case in the books, no principle of justice or reason, would justify such a course."

In *Coe v. Givan*,(5) Action of assumpsit. Verdict and set-off for a balance in favour of the defendant. Motion for a new trial, on the ground of newly discovered evidence, overruled, and on appeal: *Blackford, J.*—"The motion for a new trial was founded upon an affidavit of newly discovered evidence, but unaccompanied with proof of diligence." Upon which the court observe—"What diligence was previously used by the plaintiff to obtain his proof, does not appear. In listening to such applications, courts of justice have always been extremely cautious, and have uni-

(1) Et vide *Drew's Case*, 4 Mass. Rep. 399.

(2) 6 Monroe, 145.

(3) 2 Marsh. Kent. Rep. 42.

(4) 1 Southard, 338.

(5) 1 Blackford's Ind. Rep. 367

formly overruled them, where, upon using due diligence, the evidence might have been discovered before. 6 *Bac.* 672. Much is necessarily left to the discretion of the courts below in motions for new trials, and it requires a case much stronger than the present, to induce us to interfere with them in questions of this kind."

In *Wilbor v. M'Gillicuddy*.(1) Verdict for plaintiff, and motion for a new trial, because of newly discovered evidence. But it appeared the defendant had summoned the witness, whom he now wished to have another opportunity of examining, and dismissed him from the trial without examination. Upon this the court, denying the motion, observe—"There is an admission on record, that this witness was summoned on the trial on the part of the defendant; that he attended during the greater part of it, and that he was dismissed by defendant's counsel without being examined. There had been other contracts between the parties, in relation to molasses hogsheads; and it appears, by the evidence on record, that the witness was the person, who, on each occasion, had the possession, and made delivery of them to the defendant. If the evidence was material, we think that ordinary diligence should have induced the defendant to inquire of this person, whether he had those also in possession which formed the subject matter of the present action. Not only would diligence have suggested the propriety of seeking information there before the trial; but it appears to us it is just the quarter in which it would be sought. When we join to this obvious reflection, the fact of the witness being summoned, and dismissed without examination, we cannot say the court below erred in refusing the application."

In one case, the court may seem to have departed from the strictness of the rule, as to diligence, where the evi-

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(1) 3 *Miller's Louis. Rep.* 382.



dence had been actually in the custody of the attorney, but without his knowledge. It was an action of *assumpsit*, brought by *Broadhead v. Marshall*.<sup>(1)</sup> The jury found a verdict for the plaintiff for £161. Motion for a new trial, on the affidavit of *Ramsden*, the defendant's attorney, stating that the defendant sailed for Barbadoes on the first day of the term. That since the trial, he had discovered in a memorandum book of the defendant a receipt in full. He further swore, that at the time of the trial he did not know that he had such receipt in his custody, nor that any receipt had been given by the plaintiff to the defendant, on any account whatsoever. The motion was opposed; but, on the special circumstances of the case, and the discovery of the new and very material evidence above stated, the court made the rule absolute for a new trial.<sup>(2)</sup>

So in another instance, the rule was somewhat relaxed. *Norris v. Freeman*.<sup>(3)</sup> Debt on bond. Defendant pleaded a general release, plaintiff replied *non est factum*, and thereupon issue was joined. The defendant had a verdict. The plaintiff moved for a new trial, upon an affidavit that very strong circumstances of forgery and perjury appeared upon the trial. The court made a rule to show cause. The *Lord Chief Justice* said, he thought the evidence was very strong on the part of the plaintiff, and that, if the cause had been tried before him, he would have called out for Goff, the other subscribing witness, and if he had not been produced, he should have thought it a very strong case for the plaintiff, and directed the jury to have found a verdict for him.

Upon a motion on the ground of newly discovered evidence, the court, in order to be satisfied as to the credibility

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(1) 2 W. Blacks. 955.

(2) Vide *Blythe v. Sutherland*, 3 M'Cord, 259.

(3) 3 Wils. 38. *Supra*, p. 374.

of the witness relied on, will permit opposing affidavits to be read. *Williams v. Baldwin*.<sup>(1)</sup> Assumpsit on a promissory note, and verdict for plaintiff. Motion on behalf of the defendant for a new trial, on the ground of newly discovered evidence. Affidavits on both sides were submitted. *Woodworth, J.*, delivered the opinion of the court.—“The defendant makes oath, that since the trial, and not before, he has discovered that Stephen Tappen was a material witness for him on the trial of this cause. It appears that the endorsement is in the handwriting of Tappen; that for five or six years last past, he has been in the service of the defendant, and resided near him at the time of the trial.—These facts seem to establish great inattention in not procuring the testimony of the witness, or in not putting off the trial of the cause. They excite strong suspicion, that the defence is colourable only. The plaintiff has proved, by a number of witnesses, that Tappen is wholly unworthy of credit under oath. This it was competent for him to do. In *Pomeroy v. The Columbian Insurance Company*,<sup>(2)</sup> the plaintiff was permitted to read affidavits to question the credibility of the witness newly discovered. On the whole, I am of opinion that there has not been proper diligence to obtain the testimony of Tappen, and there are strong grounds to believe his character is infamous. The motion for a new trial must therefore be denied.

3. On motions for new trials on newly discovered evidence, it is a well settled rule not to grant them, if the evidence is merely *cumulative*, or in corroboration of testimony to a point presented at the former trial.<sup>(3)</sup> Thus,

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(1) 18 Johns. Rep. 489.

(2) 2 Caines, 280.

(3) 2 Tidd, 938. 2 Arch. 224. Gra. Prac. 511.

In *Steinbach v. The Columbian Insurance Company*.(1) Action on a policy of insurance on the ship Catherine. The destination of the ship formed the principal question at the trial. There was a verdict for the plaintiff. The defendants moved for a new trial on various grounds, and, among others, that of newly discovered evidence. *Livingston*, J., delivered the opinion of the court, and upon the point of new evidence, thus—"It is said, that if a new trial be granted, there are two witnesses, who were not known to the defendants at the time of the trial, who can testify as to the destination of the Catherine. This was the fact principally controverted on the former trial, and we are now applied to for another, merely because all the witnesses who knew something of the matter have not been examined. Every one must perceive the inconvenience and delay which will arise from granting new trials upon the discovery of new testimony, or other witnesses to the same fact. It often happens that neither party knows all the persons who may be acquainted with some of the circumstances, relating to the point in controversy. If a suggestion, then, of the present kind be listened to, a second, if not a third, and a fourth trial may always be had. There may be many persons yet unknown to the defendants, who may be material witnesses in this cause, and this may continue to be the case after a dozen trials." And new trial refused.

And, in *Smith v. Brush*.(2) Debt on bond for the penal sum of \$4000. Plea, general issue and usury. An attempt was made to establish the defence of usury, by one *Brush*, a witness produced to a conversation between the parties. The jury found a verdict for the plaintiff. A motion was made to set aside the verdict on grounds arising out of the case, and on affidavits of newly discovered

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(1) 2 Caines, 129.

(2) 8 Johns. Rep. 84.

evidence. *Per Curiam*.—"The new testimony, alleged to be discovered does not relate to any new fact, but goes merely to corroborate the credit of Brush's testimony.—But it is against the general rule to grant a new trial, merely for the discovery of cumulative facts and circumstances relating to the same matter, which was principally controverted upon the former trial. It is the duty of the parties to come prepared upon the principal point, and new trials would be endless if every additional circumstance bearing on the fact in litigation, was a cause for a new trial." The motion was denied.

So in *Pike v. Evans*.(1) Assumpsit, upon a contract that the defendant should make up and deliver certain clothing to the plaintiff. A question arose at the trial, whether the clothes had been delivered by the defendant within the time contracted for. The jury found a verdict for the plaintiff. The defendant moved to set aside the verdict, and for a new trial; and one of the grounds was, newly discovered evidence, as to which affidavits were produced of testimony, the object of which was to substantiate the delivery of the clothes in due time. *Per Curiam*.—"The newly discovered evidence is material to make out the delivery of the clothes by the time agreed on, and the only objection to granting a new trial on this ground is, that it is merely cumulative testimony. This must have been known to the defendant to be a material question on the trial. The newly discovered evidence does not relate to any new fact; and it has been repeatedly decided by this court, that a new trial ought not to be granted, merely for the discovery of cumulative facts, relating to the same matter, which was principally controverted on the former trial."

And in *Whitbeck v. Whitbeck*.(2) Assumpsit, on money

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(1) 15 Johns. Rep. 210.

(2) 9 Cowen, 353.

counts, and on a contract for a certain messuage or tenement and premises, with the appurtenances, sold by the plaintiff to the defendant, at his instance and request. Also a count for goods sold, and on an account stated. The jury found for the plaintiff. The defendant moved for a new trial on various grounds, and among others, of newly discovered evidence. *Sutherland, J.*—"There is nothing in the ground of newly discovered evidence. It is strictly cumulative upon one of the principal points in controversy upon the first trial."(1)

This rule has been illustrated with peculiar force and clearness in a recent case, which, from its nature, directed the attention of the court, in a very special manner, to the subject. *The People v. The Superior Court of New-York.*(2) Motion for a *mandamus*, to vacate a rule granting a new trial. An action of assumpsit was brought in the court below, in favour of Oebricks, against the president and directors of the Phoenix Bank, to recover the amount of a bill of exchange for \$2,500, payable at sight, and endorsed by one *Heckscher* to the plaintiff. On the trial of the cause, *Heckscher*, the drawer of the bill, testified, that he left the bill at the bank on Saturday, the 30th May, 1829, *a short time before 12 o'clock*, and that he was at the bank but once on that day. He detailed a variety of circumstances, which induced him to speak with certainty as to the particulars of the transaction. Evidence was produced, on the part of the bank, to contradict this witness, especially as to the hour of the day he left the bill at the bank. The judge charged, that if they believed that the bill in question had been left with the defendants *before 12 o'clock*, they ought to find for the plaintiff, otherwise for the defendants. The jury found for the plaintiff. A mo-

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(1) Vide 2 Hall's Rep. 391. 3 Monroe, 403.

(2) 5 Wendell, 114.

tion was then made for a new trial, on the ground of newly discovered evidence. The defendants produced an affidavit of one Russell, tending to impeach Heckscher, as to the fact of leaving the bill at the bank on the 30th of May, and other affidavits to show that the plaintiffs did not come to the knowledge of the facts until after the trial. The superior court granted a new trial, and an application was made to the supreme court for a *mandamus*, commanding that court to vacate the rule granting the new trial. *Sutherland, J.*, delivered the opinion of the court. After a review of the leading cases on the subject of new trials, growing out of questions of evidence generally, the learned judge proceeds—"These observations are equally applicable to motions for new trials founded on newly discovered evidence. It has been shown that there are certain principles, in relation to such applications, which are clearly settled and well defined, by long continued practice and an uninterrupted series of decisions, in our own and other courts. Those principles are—1. That a party is bound and presumed to know the general leading points which will be litigated in his case. 2. That if he omits to procure evidence, which, with ordinary diligence, he might have procured, in relation to those points upon the first trial, his motion for a new trial, for the purpose of introducing such testimony, shall be denied. 3. If the newly discovered evidence consists merely of additional facts and circumstances, going to establish the same points which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative, and a new trial shall not be granted. In cases to which these principles clearly and unquestionably apply, the granting or refusal of a new trial is not a matter of discretion. The parties have a legal right to a decision conformable to those principles. Where there is doubt upon the point of negligence, or as to the character of the evidence, or as to its materiality, it becomes a matter of discretion; and the court will not, perhaps I

ought to say, cannot, rightfully interfere." The court overruled the decision of the inferior court, and directed a *mandamus*, on the ground that they had assumed to exercise a discretion upon a rule of practice well settled.

This cause came up afterwards on demurrer to the alternative *mandamus*.<sup>(1)</sup> The court, by *Savage*, Ch. J., took occasion to recognise all the rules governing applications of this kind, in the following clear and succinct manner—"With respect to granting new trials, on the ground of newly discovered testimony, there are certain principles which must be considered settled. 1. The testimony must have been discovered since the former trial. 2. It must appear that the new testimony could not have been obtained with reasonable diligence on the former trial. 3. It must be material to the issue. 4. It must go to the merits of the case, and not to impeach the character of a former witness. 5. It must not be cumulative." As to what constitutes *cumulative* evidence, the learned chief justice adds—"According to my understanding of cumulative evidence, it means additional evidence to support the same point, and which is of the same character with evidence already produced. For instance: The defendants in the court below proved by the third teller, that the bill in question was not delivered until after twelve o'clock—all subsequent witnesses, who prove the same fact, are cumulative; their testimony is added to, or heaped up, upon that of the first witness." And upon the grounds that the defendants below were guilty of *laches*, and that the evidence was *cumulative*, and especially the latter, the demurrer was overruled, and a peremptory *mandamus* granted.

The same rule of practice exists, and the same distinction prevails in Massachusetts. *Gardner v. Mitchell*.<sup>(2)</sup> The plaintiff recovered a verdict for \$5,337, in an action

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(1) 10 Wendell, 285.

(2) 6 Pick. 114.

brought for an alleged breach of contract on the sale of two parcels of oil, one of 1000 barrels, the other of 50,000 gallons, which was warranted by the defendant to contain twenty-eight parts of a hundred in head matter, and to be of a fair merchantable quality. The plaintiffs introduced evidence tending to show that the oil delivered was deficient in quantity and quality, and that it did not contain the stipulated proportion of head matter. The defendant now moved for a new trial, on the ground of newly discovered evidence. This evidence appeared in the depositions of two witnesses, to certain conversations with the plaintiffs, changing very essentially the complexion of the case, and no attempt was made to impeach the depositions. *Per Curiam*—"This is somewhat of a critical matter, as a party may so readily obtain new evidence to supply former deficiencies. Still the court ought not to shut their eyes to injustice on account of facility of abuse in cases of this sort. The evidence now brought forward is of confessions of the plaintiffs, and the question is whether it is new, or only cumulative. If only cumulative, it does not furnish a sufficient cause for a new trial. This is the ground taken in New-York, and the reason is that the party should have taken care to produce evidence enough to establish his point. But this evidence is of a different character. As to the body oil, which is made a subject of complaint, there is a confession of one of the plaintiffs that it was as good as he expected. This is a new fact which was not before in the case. The verdict was general, and apparently injustice has been done." (1) New trial granted.

So, in New-Jersey. *Den v. Geiger*. (2) On a motion for a new trial, an affidavit was read to show that the defendant had discovered new evidence since the trial. This,

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(1) Et vide *Chambers v. Chambers*, 2 Marsh. Kent. Rep. 349.

(2) 4 Halst. 225. *Supra*, p. 203.



with the law, formed the ground of the motion. The *Chief Justice*, who delivered the opinion of the court, after disposing of the other points, reviews the affidavits read as to the new evidence, which he pronounces to be cumulative, and proceeds—"Such being the character of the newly discovered evidence, it cannot sustain the present application. A new trial will not be granted to let in a party to the production of new witnesses for the purpose of discrediting those examined by his adversary; nor on account of the discovery of new evidence of a cumulative character. Both these rules have been decided in this court, and I shall rely on the cases here, without a review of the decisions elsewhere, which however in England, Massachusetts, and New-York, notwithstanding some apparent aberrations, are entirely accordant with our own."(1)

And in Vermont, *Bullock v. Beach*, a case, in which the question of evidence, as it bears on new trials, is examined at large; it was held, a new trial will not be granted on the ground of new discovered evidence, if such evidence be merely cumulative, and tend to prove the same facts to which evidence was introduced on a former trial; nor unless the court be of opinion that injustice has been done by the verdict, and that the new evidence would have occasioned a different result.(2)

So, *Den v. Wintermute*,(3) in ejectment, and verdict for the plaintiff. The defendant moved to set aside the verdict, and for a new trial, on the ground he had discovered a witness, since the trial, who could give material evidence. But it appeared it was to a fact that was in issue at the trial, and tending only to strengthen a presumption in favour of the defendant. The court regarded it as cumulative, and therefore refused the motion, observing—"A

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(1) Et vide 1 Halst. 474. 2 Halst. 127. 1 South. 388.

(2) 3 Verm. Rep. 73.

(3) 1 Green's N. J. Rep. 177.

new witness to character, credit, handwriting, dates, absences, violences, and the like, might be found after half a dozen trials. It would render new trials endless, if every piece of cumulative evidence not known of before, was ground for setting aside a verdict. It ought to respect a new point; one that has come to light since the trial, on which the party has never been heard; such as the discovery of a release, or receipt for part payment, or some new ground of defence; and not further evidence in support of an old ground, that has been once contested already.(1)

But, although the new evidence be intimately connected with some parts of the testimony at the trial, yet if it be specifically distinct and bear upon the issue, a new trial will be granted. This distinction was taken in the case of *Gardner v. Mitchell*,(2) cited above, and still further illustrated in *Guyot v. Butts*.(3) Motion for a new trial on the ground of newly discovered evidence. The plaintiff had obtained a verdict on a due bill of \$300, by the testator of the defendants. The defence set up was payment, and evidence to that effect had been produced by the defendants. The affidavit of newly discovered evidence disclosed that Butts, the acting executor of the will of Thompson, since the trial, had discovered that he could prove, by one Vickery, the admissions of the plaintiffs made previous to the death of Thompson, that nothing was due upon the due bill in question, and that similar admissions would be proved by other witnesses, whose affidavits were not produced. *Marcy, J.*, delivered the opinion of the court—"The principal objection relied on in opposition to the motion is, that the newly discovered evidence is cumulative. I find no case in which a very

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(1) Et vide Hardin's Rep. 345.

(2) 6 Pick. 114. Supra, p. 490.

(3) 4 Wendell, 579.

distinct definition is given of cumulative evidence. The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue, that the evidence on the first trial was introduced to establish, is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative; but we are not to look at the effect to be produced, as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled. The kind and character of the facts make the distinction. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative." Upon this distinction applied to the newly discovered evidence, as stated in the defendant's affidavits, a new trial was granted.(1)

In the State of New-York, one exception to this general rule has been introduced in relation to trials investigating the title to lands in the military tract, founded on considerations alleged to be peculiar to that class of cases. Thus,

In *Jackson v. Kinney*,(2) in ejectment. The plaintiff's lessors claimed under a patent to one William Rullins, and produced two witnesses, Swartwout and Sherwood, to show that William Rullins and William Rowley were the same person. At the trial a verdict was found for the plaintiff, which the defendant now moved to set aside, on the ground of newly discovered evidence. The affidavits which were read on the part of the defendant, were calculated to impeach the testimony of Sherwood, the principal witness for the plaintiff. Affidavits were read on the part of the plaintiff to support the character of Sherwood. *Per*

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(1) Vide *Watson v. Delafield*, 2 Caines, 224. *Reed v. McGrew*, 1 Ham. Ohio Rep. 386.

(2) 14 Johns. Rep. 186.

*Curiam*.—"This is an application for a new trial on the ground of surprise, and newly discovered evidence. The newly discovered evidence is for the purpose of impeaching the character of one of the witnesses, examined on the part of the plaintiff. As a general rule, we have refused granting new trials on this ground. We have, however, repeatedly in trials concerning the military lots, been more liberal in granting new trials, owing to the obscurity and multifarious frauds attendant upon those titles, and especially, when the question turns upon the identity of the soldier, from whom the title is claimed to be derived.—Upon the whole, considering the length of the defendant's possession, upwards of nineteen years, and that the soldier is represented as having two names, and as considerable doubt rests upon the plaintiff's claim, we are inclined to think the ends of justice will be best answered by sending the cause back to a new trial."(1)

So in *Jackson v. Hooker*,(2) in ejectment. A verdict was found for the defendant, and a motion was now made for a new trial, on grounds which are sufficiently stated in the opinion of the court. *Sutherland, J.*—"This is an application, on the part of the plaintiff, for a new trial, on the ground of surprise, and also of newly discovered evidence. The action was brought to recover possession of a part of a lot, patented to Richard Gorman. The lessors of the plaintiff were the children of James Gorman, who, they contend, was the brother and heir at law of Richard. Whether he was, or was not so, was the turning point in the cause. The evidence on the part of the defendant tended to show, that the grand-parents of the lessors never had but two children; a daughter named Molly, and James, the father of the lessor. The evidence was very

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(1) Et vide 9 Johns. Rep. 489. 12 Johns. Rep. 354.

(2) 5 Cowen, 207.

contradictory, and left it extremely doubtful what the fact was." After reviewing the testimony of one Hooker, which went to prove there was no such man as Richard, in contradiction to one Sarah Gorman, the learned judge proceeds—"The lessors of the plaintiff are not chargeable with any negligence in not being prepared to repel the evidence of Hooker. They were not bound to anticipate, that a story, so entirely irreconcilable with the deposition of Sarah Gorman, their witness, would be imputed to her.—I am inclined to think the ends of justice will be best answered by giving the plaintiff an opportunity of repelling or explaining this testimony. It will not be going further than this court has repeatedly gone, in granting new trials relative to military lots. That class of cases is considered peculiar, and as exempt from the ordinary rules in relation to granting new trials."

4. Closely allied to the preceding rule, is another, that if the alleged newly discovered evidence consists in an attempt to discredit witnesses who testified at the former trial, a new trial will not be granted.(1) Thus,

*Ford v. Tilly*.(2) An inquiry found four voluntary escapes, for which Ford, warden of the *Fleet*, forfeited his office. Issues hereupon were tried in B. R. at the bar. One escape was proved by a witness, who was asked if he was never burnt in the hand for stealing a tankard? He answered, no. A new trial was moved for upon producing the record of the conviction, and the court denied the motion, "1st, because it was a trial at bar. 2dly, it is no reason for a new trial that you, for the defendant, came not prepared."

In *Thurtell v. Beaumont*.(3) There was a verdict for

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(1) Vide ante, 221—235.

(2) 2 Salk. 653.

(3) 1 Bingham, 339. Supra, p. 170.

the plaintiff, which the defendant moved so set aside, on the ground that the principal witness had been subsequently indicted with the plaintiff and others for a conspiracy to defraud the defendants. *Park, J.*—"On this point, I have looked into the books. I find many applications for new trials, on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case, where the ground of the motion was that a bill for perjury had been found against the principal witness, Lord *Mansfield* said, that the granting the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to delay execution by indicting his adversary's witnesses. In *Warwick v. Bruce*,<sup>(1)</sup> Lord Ellenborough discharged with costs a rule to stay execution, till after the trial of an indictment against the plaintiff's witnesses for perjury; and in *Bartlett v. Pickersgill*,<sup>(2)</sup> in Lord Henley's time, a plaintiff having petitioned for leave to file a supplemental bill, because the defendant had, on the evidence of the plaintiff, been indicted and convicted for perjury, on his answer to the original bill, Lord Henley dismissed the petition."

*Duryee v. Dennison*.<sup>(3)</sup> Assumpsit on a promissory note against the endorser. The defence set up was want of notice. A witness for the plaintiff proved the defendant had agreed to consider the demand and notice as made in time. A verdict was found for the plaintiff. A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge; and also on the ground of newly discovered evidence. From the affidavits, it appeared that the object of the newly discovered evidence was to impeach the credit of the testimony given by one

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(1) 4 Maule & Selw. 140.

(2) 4 East 577. n.

(3) 5 Johns. Rep. 248.

Aikin, the principal witness of the plaintiff, who had died since the trial. *Kent*, Ch. J.—“We are of opinion that the testimony of Aikin, as given at the trial, was sufficient to support the verdict. The rule is now settled, that if an endorser has not had regular notice of non-payment by the drawer, yet if, with knowledge of that fact, he makes a subsequent promise to pay, it is a waiver of the want of due notice, and *assumpsit* will lie. All this was made out by the testimony of Aikin, and the motion for a new trial is founded on affidavits which go to impeach the credit of his testimony. But this ought not to be permitted; and the case of *Huish v. Sheldon*,<sup>(1)</sup> is strongly to the point. That was a motion for a new trial, on an affidavit impeaching the testimony of a material witness, and the court denied the motion, and said, that it would be productive of the most dangerous consequences, if a verdict should be set aside, because a witness had made a mistake in giving his evidence.”<sup>(2)</sup>

So, *Hammond v. Wadhams*,<sup>(3)</sup> cited above. The demandant moved for a new trial, because the verdict was against the evidence, and because testimony was given on the trial by one John Fanning, which testimony, if credited by the jury, had a tendency to induce them to find a verdict for the tenant; and the demandant would, on a new trial, be able to prove that the said John has declared that *he would swear falsely in any action for four-pence-half penny a time, and that he believed when he should die, that he would perish like a brute*; which evidence of the said John's infidelity, was not known to the demandant until after the trial. *Parsons*, Ch. J.—“It is not suggested by the demandant, that he was surprised by Fanning's

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(1) Sayer, 27.

(2) Et vide 3 Johns. Rep. 255. 4 Johns. Rep. 425.

(3) 5 Mass. Rep. 353. Supra, p. 231.

testimony. On the contrary, he came prepared to discredit him, which he effectually did in the opinion of the judge. To grant a new trial to give further opportunity to discredit a witness whose testimony was not unexpected, and who had in fact been discredited, would be unprecedented, and productive of mischievous consequences. We cannot therefore grant a new trial on the second ground on which it was moved.”(1)

Nor will even the confession of a witness, to his own discredit, be received as that kind of new evidence which will entitle the party to a new trial.(2) Thus,

In *Waite's* case,(3) he moved the court for a new trial, on the ground he was improperly convicted, and submitted affidavits going to discredit Richardson, the principal witness, from his own confessions. *Parsons*, Ch. J.—“The confessions of a witness as to his incompetency, cannot be admitted to disqualify him. If the law were not so, any unwilling witness for the commonwealth might deprive the commonwealth of his testimony, by declarations of his interest, in the presence of the friends of the defendant, who by testifying to those declarations, might always prevent his being sworn. The objection founded on a subsequent discovery of the incompetency of Richardson, is therefore not supported.”

To this rule there may be found two exceptions ; one in the case of *Fabrilus v. Cock*.(4) This, however, was a case *sui generis*, with so many circumstances peculiar to itself, as to render it improbable a case similar in all its parts should ever occur, addressing itself at large to the discretion of the court, who were perfectly satisfied the whole was a fiction, supported by perjury.(5) The other is *Lister v. Mundell*.(6) A question arose as to whether

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(1) Et vide 1 Caines, 24. 1 Halst. 434.

(2) Vide ante, 234. (3) 5 Mass. Rep. 261. Supra, p. 231.

(4) 3 Burr. 1771. Supra, p. 224. (5) Vide 5 Johns. Rep. 250.

(6) 1 Bos. & Pul. 427. Supra, p. 233.



the defendant, who was a bankrupt, was entitled to the benefit of the act. The court directed a nonsuit on a plea of bankruptcy, and there was a verdict for the plaintiff. But upon motion for a new trial, on grounds impeaching the plaintiff's witnesses, the court took the distinction between the declarations of the witness and the facts and circumstances, minutely detailed, for the purpose of giving his declarations credit; and being satisfied that the circumstances were clearly falsified by the affidavits on which the motion was grounded, they unanimously directed the rule to be made absolute.(1)

So, in a recent case in Massachusetts, *Chatfield v. Lathrop*.(2) This was a petition for a new trial. Chatfield sued Lathrop, to recover \$63, which he had paid him. The verdict, which was in favour of Lathrop, turned upon the testimony of one Piper, who testified that he was present on the 5th of March, when money passed from Chatfield to Lathrop, but that the sum of \$63, which Chatfield contended he had paid to Lathrop at that time, was not so paid. Chatfield objected to Piper, on account of his interest, and the witness being put on the *voir dire*, the objection was overruled. The ground of the present application was, that Chatfield had discovered evidence since the trial, which would exclude Piper's testimony, and if he should fail in this, that he had discovered evidence since the trial, which would prove, by the declarations of Lathrop and Piper, that he did pay the sum of \$63 to Lathrop. *Per Curiam*.—"On the part of the respondent, it is said, that as the witness was put upon the *voir dire*, the evidence now produced to show that he was interested is inadmissible. If this evidence had been known at the time of the trial, it would be so; but as the case proceeds upon the ground of newly discovered evidence, we think it ought

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(1) Vide 5 Dow, 273. 4 Littell, 118.

(2) 6 Pick. 417.

to be received. Still, it might be questioned, whether a new trial should be granted, on account of the inadmissibility of the witness. The evidence, however, goes further. It shows, that the defendant and Piper both admitted, that the plaintiff had paid the \$63. The testimony of the new witnesses would contradict Piper, and if he were discredited, would support the action. It is then said that this evidence is cumulative; but we do not consider it to be so. Cumulative evidence is such as tends to support the same fact which was before attempted to be proved. Here the new evidence is to show, that Piper confessed he testified what was untrue. This was not in controversy at the trial. Justice requires that a new trial should be granted."

This may seem at variance with *Waite's case*, in the same court. But that case turned upon the confessions of the witness; this, of the party himself, as well as the witness, and it has been held, that the party's declarations, to the interest of the witness, will render him incompetent to be sworn. So ruled in this same court, in *Pierce v. Chase*.<sup>(1)</sup>

Nor will the court allow a new trial, on the ground of new evidence, if the verdict is for the defendant, and the object be to set up a hard defence.

*Beers v. Root*.<sup>(2)</sup> This was an action of slander, brought against the defendant, for saying that the plaintiff had passed counterfeit bank notes. There were several counts in the declaration. The defendant pleaded not guilty, with notice of justification. The jury found a verdict for the plaintiff. A motion was made to set aside the verdict, and for a new trial, on the ground of newly discovered evidence. The affidavit of the defendant stated, that since the trial of the cause, he had discovered new evidence, which was unknown to him at the time of the trial; the

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(1) 8 Mass. Rep. 487.

(2) 9 Johns. Rep. 264.

nature of which evidence was set forth in the affidavit. *Per Curiam*.—"The law will not allow a new trial to the defendant, merely to afford him an opportunity to prove the plaintiff a *felon*. Such an indulgence would not have been granted to the *people*, if the party so charged had been once tried and acquitted. If the defendant had discovered new evidence, which went to the plea of *not guilty*, and that only, it would have altered the case ; but we cannot permit him to fish for further evidence to support his plea of a justification of such a charge. The motion must be denied."

It may be proper to add, that by a general rule of the supreme court of New-York,(1) motions of new trials will not be heard on affidavits alone. They must be accompanied with a case.(2)

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(1) 7 Wendell, 331.

(2) On this subject generally, vide ante, on Mistake, Surprise, and Impeachment of Witnesses, Chap VII., *passim*.

## CHAPTER XIV.

### IN HARD ACTIONS.

PROCEEDINGS at law, are by action or indictment. As these terms stand contradistinguished, the former denotes suits between individuals, or corporate bodies as individuals, in civil tribunals; the latter proceedings, in courts of criminal jurisdiction, where the public is on one side invariably as the prosecutor, and individuals on the other. Hard actions strictly include only civil proceedings, involving in their nature some peculiar hardship, arising from the odium attached to the alleged offence, or the severity of the punishment which the law inflicts upon the offender in the shape of damages. To this belongs most actions arising *ex delicto*. Trespass, slander, libel, seduction, malicious prosecution, criminal conversation, deceit, gross negligence, actions upon the statute, or *qui tam* actions, prosecuted by informers, and penal actions, prosecuted by special public bodies, or the public at large, are ranged under this head. But as they partake, less or more in their nature and effect, of prosecutions in criminal offences, the rules that govern in granting or refusing new trials, and the reason of those rules, are drawn from criminal cases, rather than civil. In all proceedings by indictment, and in all offences partaking of a criminal intention, it is a rule of universal application, that where the defendant has been acquitted on the merits, a new trial will not be allowed. This equally applies to misdemeanors, felonies not capital, or in the language of the old common law clergyable felonies, and capital crimes, or such as draw after them the punishment of death. In cases

of the latter description, where there is a conviction, the law is thus laid down by Chitty :—" In case of felony, or treason, it seems to be completely settled, that no new trial can in any case be granted ; but if the conviction appear to the judge to be improper, he may respite the execution to enable the defendant to apply for a pardon." (1) This rule is not to be construed to apply in all cases without exception, where the defendant is convicted. It is settled, that for irregularity, the courts may interfere. (2)

One case of high authority, *The United States v. Fries*, (3) shows that this is the true construction of the rule in this country. There the defendant was convicted of treason, and, upon the ground of a mis-trial, caused by the intemperate declarations of a juror before he was impannelled, a new trial was directed. In this instance, the court asserted, and acted on its power to interfere in the highest offences.

In South Carolina, in *Hopkins' case*, (4) on a conviction for forgery, the court granted a new trial, on the ground of misbehaviour in one of the jurors, observing, "that the matter of fact set forth in the affidavit, if true, was a good ground for a new trial ; and it would be difficult to say it was not so, even if the character of the witness was of a suspicious nature. At all events, it was a doubtful point, in which case it was the duty of the court to lean on the merciful side, and give the prisoner another chance for a fair trial." A new trial was accordingly ordered ; the prisoner was again tried at the ensuing sessions, and acquitted.

In the recent case of *The People v. Ransom*, (5) the supreme court of this state heard the motion for a new trial, and decided it, on the assumption of competent power to grant a new trial, had a proper case been presented.

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(1) 1 Chit. Cr. Law, 654.

(2) 6 Bac. Abr. 676.

(3) 3 Dallas, 515.

(4) 1 Bay, 372.

(5) 7 Wendell, 417.

There can be no doubt, that the courts of supreme jurisdiction have the power, and are in the habit of exercising it, when proper cases occur, of granting new trials in capital, and all other felonies, where an irregular and unjust conviction has taken place.(1) And it appears to be equally well settled, as well in England as in this country, that where the defendant is acquitted, no new trial will be granted; although it must be conceded, that the same power, which interposes in cases of conviction, is equally competent to interfere, in cases where the acquittal is clearly illegal. But it is put upon a different ground. It is the humane influence of the law, mingling justice with mercy, *in favorem vitæ et libertatis*. As to misdemeanors, it is conceded, the court has a similar power, and may exercise it in unjust acquittals. "However," adds Chitty, "in all cases of misdemeanor, after a conviction, there is no doubt that the superior courts may grant a new trial, in order to fulfil the purposes of substantial justice."(2) Yet there are no instances of new trials after acquittal, unless in cases where the defendant has procured his acquittal by unfair practice. Thus, the rule is laid down by the same author: "A new trial cannot, in general, be granted, on the part of the prosecutor, after the defendant has been acquitted, even though the verdict appears to be against evidence. But it seems to be the better opinion, that where the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back the prosecutor's witnesses, or neglecting to give due notice of trial, a new trial may be granted."(3) But the rule has never been extended to new trials upon the merits, either in England or this state, perhaps no part of this country, in causes above the degree of

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(1) Vide 5 Wendell, 39.

(2) 1 Chit. Cr. Law, 654.

(3) 1 Chit. Cr. Law, 657.

misdemeanor; certainly not in capital felonies. Cases of this kind are committed to the pardoning power, accompanied with the doubts of the judges, and the recommendation of the prisoner, by the jury, to mercy.(1)

The rules in criminal cases would thus appear to be reducible to three. 1. That a new trial on the merits will not be granted in any case above a misdemeanor, whether the defendant be acquitted or convicted. 2. That for irregularity, in all cases, whether misdemeanors or felonies, new trials may be granted, when there is a conviction. 3. That in misdemeanors new trials may be granted on the merits, when there is a conviction, but not in cases of acquittal. These rules are all illustrated and enforced in a recent case in our supreme court. *The People v. Comstock*.(2) The defendant was tried on an indictment for *grand larceny*; the indictment having been removed from the *oyer* and *terminer* into this court, by *certiorari*. The defendant was acquitted, and a new trial was moved for, on the ground of the alleged misdirection of the jury by the presiding judge. By the court, *Sutherland, J.*—"It appears to be perfectly settled, that in offences greater than misdemeanor, a new trial cannot be granted on the merits, even where the prisoner has been convicted. Thus, in *The King v. Mawbey and others*,(3) Garrow, *arguendo*, speaking of misdemeanors, says: 'If the defendant were unquestionably guilty, and the jury acquitted him, yet the court cannot grant a new trial; on the other hand, if a defendant be convicted of felony or treason, though against the weight of evidence, there is no instance of a motion for a new trial in such a case, but the judge passes sentence, and respites execution, till application can be made

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(1) Vide 1 Chit. Cr. Law, 654. 13 East, 412. 4 Chitty's Black. Com. 361, *et in notis*.

(2) 8 Wendell, 549.

(3) 6 Term Rep. 625.

to the mercy of the crown.' Lord Kenyon, in delivering his opinion, in that case, *ibid.* 638, says: 'In one class of offences, indeed, those greater than misdemeanors, *no new trial can be granted at all*: but, in misdemeanors, there is no authority to show that we cannot grant a new trial, in order that the guilt or innocence of those who may have been convicted may again be examined into.' The whole scope of that case seems to warrant the opinion, that even in a misdemeanor, a new trial cannot be granted, where the defendant has been acquitted; but in relation to felony and treason, it treats the proposition as unquestionable, that no new trial can be granted, even where the prisoner was convicted, *a fortiori*, after an acquittal. Mr. Chitty,<sup>(1)</sup> says: 'In cases of felony or treason, it seems to be completely settled, that no new trial can, in any case, be granted: but if the conviction is improper, the prisoner must be respited until a pardon be applied for. But in case of misdemeanor, after a conviction, a superior court may grant a new trial.'<sup>(2)</sup> After this general view of the subject, the following rules are submitted.

1. In convictions for felonies, on the ground of irregularity, the courts will interfere, and grant or refuse a new trial, as may best subserve the ends of justice.

We have seen, that irregularities in the summoning or empannelling of jurors, where no injustice to the defendant ensues, will be disregarded.<sup>(2)</sup> It is not within the scope of this work, to enter into a minute illustration of this rule, as regards criminal proceedings. It is introduced rather for the purpose of tracing to it the reasons for granting or refusing new trials, in those designated "hard ac-

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(1) Chitty's Cr. Law, 654.

(2) Vide 13 East, 416. 3 Christ. Black. Com. 388, *in notis*.

(2) Ante, Chap. II.



tions," and thus to give effect to the work, without endangering its unity. Suffice it to add a few cases of irregularity, in which the courts have directed the cause to a new jury, in illustration of the rule.

As where the first jury has been discharged without a verdict. Thus in *The People v. Goodwin*,<sup>(1)</sup> indicted for manslaughter. The jury having retired to consider of their verdict, at two o'clock in the morning of the fifth day, remained until six o'clock in the afternoon of the same day, (Saturday,) when they came into court, and being asked as to their verdict, answered by their foreman, that they found the prisoner guilty, but begged leave to recommend him to the mercy of the court. Before the verdict was recorded, the counsel prayed that the jury might be polled; and on being polled accordingly, the third juror answered, not guilty. The jury were then sent out to reconsider of their verdict. After remaining until a late hour, and, having answered the court, to a question put, whether they could agree within half an hour, being the latest period to which the court could sit according to law, that there was not the least possibility of their agreeing, they were thereupon discharged by the court. A motion was now made that the prisoner should be discharged, having been once tried. *Spencer*, Ch. J., delivered the opinion of the court. After reviewing the facts in the case, and examining the reasons and authorities urged in favour of the motion, the learned judge concludes:—"Upon full consideration, I am of opinion that, although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity; that it may be exercised without operating as an acquittal of the defendant; that it extends as well to felonies as misdemeanors; and that it exists, and may discreetly be exercised in cases

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(1) 18 Johns. Rep. 187.

where the jury, from the length of time they have been considering a cause, and their inability to agree, may be fairly presumed as never likely to agree, unless compelled so to do from the pressing calls of famine or bodily exhaustion. And in the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated, and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal ;” and the motion was denied.(1)

So in *Commonwealth v. Purchase*.(2) Purchase was set to the bar to be tried on an indictment for murder, and the cause was committed to a jury ; who, after having deliberated upon it more than two hours, returned into court without having been able to agree on a verdict. The court, after instructing them on some points of law, sent them out again. The next day, after a further deliberation for sixteen hours, it appearing to the court that there existed a difference of opinion among them, which further deliberation would have no tendency to remove, the indictment was taken from them, and they were discharged. Purchase was afterwards tried on the same indictment, and convicted of manslaughter ; upon which he moved in arrest of judgment, on the ground that his life had been twice put in jeopardy for the same offence. The counsel for the prisoner urged the *dictum* of Lord Coke :—“ A jury sworn and charged in case of life or member, cannot be discharged by the court, or any other, but they ought to give a verdict ;”(3) which was answered by *Parker*, Ch. J., who delivered the opinion of the court.—“ The question to be discussed, therefore, is, whether by the common law, or by virtue of the constitution of the United States,

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(1) Et vide *The People v. Denton*, 2 Johns. Cas. 275.

(2) 2 Pick. 521.

(3) Co. Litt. 227.

a second trial for the same offence is prohibited, when the first shall have failed on account of the disagreement of the jury.—In regard to the doctrine of Lord Coke, it undoubtedly maintains the objection; but the very universality of the rule laid down by him, has led great luminaries of the law to deny its correctness. Sir Michael Foster and Sir Matthew Hale, both of them as learned in the criminal law, at least, as Sir Edward Coke, have maintained a different doctrine; and numerous cases in the English courts have been decided against his opinion. If his opinion be true, then if a juror drop dead in a fit, or if the prisoner be seized with insanity, or if a female be taken with the pains of labour, or if one of the jurors abscond, so that he cannot be found, or, in short, if any circumstance should providentially happen, to interrupt the trial after the cause is committed to the jury, the prisoner must go free; for a mis-trial, under such circumstances, would amount to an acquittal; and in all such cases jurors have been withdrawn, and the prisoner tried again.—Many cases may be suggested, equally strong with those, which have been judicially acted upon, for which there would be no relief, if the rule admits of no exceptions, or if the court are limited in their discretionary authority, to those exceptions which have already been established. Suppose the court-room should suddenly take fire, or be suddenly struck with lightning, or a tremendous earthquake should happen, so that the lives of all should be in jeopardy, and the jury, panic struck, should disperse, could not the judge order the prisoner to be remanded, and commence the trial anew? Suppose the judge assigned to hold the sessions, should, while waiting the return of the jury, be seized with an apoplexy and die, and no other judge being present, the jury should separate; shall the prisoner go free, or shall there be a new trial? These are cases which seem to leave no doubt, and yet they are not to be found in any judicial decision. The truth is, that the cases recorded are but examples to illus-

trate the application of the rule, not rules themselves, by which future judges are to be limited and restrained." Motion overruled.(1)

In *The United States v. Haskell and Francois*,(2) which was an indictment for making a revolt ; piratically and feloniously running away with the vessel and goods to the value of \$50 ; laying violent hands on the captain to hinder his fighting in defence of his vessel, and yielding up the vessel to a pirate. After the jury had retired to deliberate on their verdict, they returned to the bar, and being asked if they had agreed upon a verdict, answered by their foreman that they found the prisoners guilty upon the first count, and not guilty upon the other counts. But being polled, one juror, after much apparent agitation, and declaring that he was not quite collected, answered, not guilty. The court being satisfied, not only from the appearance and conduct of this jurymen, but from the declarations of many of the jurymen, as to the conduct and speeches of this person, that he was insane, and totally unfit to act as a jurymen, caused the following entry to be made on the minutes. "The jury, having been kept together three days, and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, and the court being satisfied of the insanity of one of the jurymen, discharges the jury without the consent of the counsel for the prisoners." The jury were discharged, and a plea interposed on behalf of the prisoners, declaring the discharge of the jury equivalent to an acquittal, which was overruled by the court, after argument, on demurrer.(3)

In a capital case, *The People v. McKay*,(4) It appeared

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(1) Vide ante, 80—95. 7 Howell's St. Tri. 315. *The People v. Olcott*, 2 Johns. Cas. 301. 9 Mass. Rep. 494. 2 Gallison, 364.

(2) 4 Wash. C. C. Rep. 402.

(3) Vide *United States v. Perez*, 9 Wheaton, 579.

(4) 18 Johns. Rep. 212.

that the prisoner was indicted for the murder of his wife, by administering to her arsenic, and he was tried and convicted. The prisoner moved in arrest of judgment, on the ground that no *venire* had been issued to the sheriff to summon the petit jury; it appearing, after the prisoner was convicted, that the supposed *venire* was not under the seal of the court, and that no official return was made by the sheriff to the *venire*, with the panel of jurors annexed to the writ. *Spencer*, Ch. J., delivering the opinion of the court—"It has properly been conceded by the attorney-general, that the paper purporting to be a *venire*, is to be regarded as a nullity, it not having the seal of the court impressed upon it.—It has not been controverted, and it certainly could not be with effect, that at common law, a *venire* is essentially necessary to authorize the sheriff to summon a jury, and that an omission of that process would be a fatal defect.—We are not of the opinion, that the prisoner's peremptory challenge of jurors, was a waiver of his right to object now to the want of a *venire*.—It is a humane principle, applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing upon all his rights, and waiving nothing on the score of irregularity. We are therefore clearly of opinion, that the judgment must be arrested. His counsel has suggested a doubt, whether arresting the judgment does not entitle him to be discharged, without being subjected to another trial. It will be observed, that the judgment is arrested on the motion of the prisoner. An act done at the request, and for the benefit of a prisoner, we are clearly of opinion cannot exonerate him from another trial. A case analogous in principle, occurred in Ontario county, in 1814. A woman of colour was indicted and tried for murder, and found guilty. The jury had separated after agreeing on a verdict, and before they came into court; and on that ground a new trial was granted, and she was tried again. We know of no case which contains the doctrine that where a

new trial is awarded, at the prayer, and in favour of a person who has been found guilty, he shall not be subject to another trial.”(1)

So, in *The People v. Grays*,(2) where an objection was taken to the judge not charging the jury, and a motion to set aside the verdict on that ground. The trial occupied four days, and was closed about ten minutes before twelve o'clock on Saturday night. It was conceded by the public prosecutor, that if the jury were of opinion that the defendants, or either of them, were guilty of manslaughter only, they might so find. The defendants' counsel requested the presiding judge to charge the jury upon the law and the facts, who declined to do so, and submitted the case to the jury without any remarks. The defendants were convicted of murder. An exception was taken to the omission of the judge to charge the jury, and the case was brought up for the advice of this court. By the court, *Savage*, Ch. J.—“It is no doubt the duty of the judge to charge the jury, and state to them the law of the case; but there may be good reasons for omitting to do so. In this case, there was no dispute about the law, and the facts and intents were for the jury to decide. Had the judge undertaken to charge the jury, he could not have done so before the Sabbath morning, when the jury must have been discharged or kept together over the Sabbath. He therefore exercised his discretion, and submitted the case without a charge. The verdict ought not to be set aside on this ground, unless it manifestly appears, that the omission of the judge operated to the *prejudice* of the defendants.”(3) That it had no such effect, appears from a

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(1) Vide 2 Hale's P. C. 260. 2 Curwood's Hawk. P. C. 561. 1 Chit. Cr. Law, 522. *Commonwealth v. Parker*, 2 Pick. 550.

(2) 5 Wendell, 289.

(3) Vide *The People v. Ransom*, 7 Wendell, 417.

comparison of the evidence with the verdict. The testimony presents a clear case of wilful murder by James Gray, and of aiding and assisting by Elijah Gray. The verdict is fully supported by the evidence, and a new trial ought not to be granted.<sup>7</sup>

And, in *Commonwealth v. Green*,<sup>(1)</sup> the supreme judicial court of Massachusetts have held the power of the court to grant a new trial, in a capital case, after conviction, upon the ground of the admission of illegal testimony. The prisoner was convicted of the murder of one Williams. On the trial, several witnesses were produced and sworn on the part of the government, among whom was one Sylvester Stoddard, who had been convicted of larceny, and was under sentence for the same in the state prison at the time the murder of Williams was committed, but had been pardoned previously to the trial by the executive of the commonwealth, and was admitted by the court as a competent witness. The prisoner's counsel moved for a new trial, on the ground of the incompetency of the witness, *propter delictum*. Parker, Ch. J., after an elaborate review of the practice in England and this country, concludes, that, in the highest species of crime, the court have the power and right to grant new trials where there has been a conviction, and denies the motion on the technical ground, that the objection to the introduction of the witness had not been raised at the trial. This case, it must be noted, goes beyond the usual ground of mere irregularity, and inclines to the practice of the court's interposing their power with equal effect on the merits. Whether to this extent it would be regarded as law in the sister states, may well be doubted.

The converse of the rule is, that the court will grant a new trial in criminal cases, where the defendant has been

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(1) 17 Mass. Rep. 515.

illegally convicted. We have already noticed the case of *Fries*,<sup>(1)</sup> and *Comstock*.<sup>(2)</sup> To these may be added, *The People v. The Sessions of Chenango*,<sup>(3)</sup> where the court claim the right to grant new trials upon the merits, to the exclusion of inferior courts; but conceding to them the power of granting new trials for irregularity.<sup>(4)</sup> *The State v. Hopkins*,<sup>(5)</sup> *The State v. Hayward*,<sup>(6)</sup> and *The United States v. Perez*,<sup>(7)</sup> already cited, and *Shute v. Good*,<sup>(8)</sup> and *Martin v. McNight*,<sup>(9)</sup> will further illustrate the rule.<sup>(10)</sup>

2. In misdemeanors, the court has the acknowledged right to grant new trials, on the merits, as well as for irregularities; but it is held, as a principle of almost universal application, that a verdict for the defendant will not be disturbed. Thus,

In cases of *libel*, as in *The King v. Bear*.<sup>(11)</sup> Upon an indictment for a libel, the defendant was by verdict acquitted. Mr. Attorney General moved for a new trial, but it was denied; and the court said, that anciently it was never done in criminal cases where defendants have been acquitted. Latterly, where it has been a verdict obtained by fraud or practice, as stealing away witnesses, &c., it has been done; but never yet was done merely upon the reason, that the verdict was against evidence.

Nor in a case of *riot*, as in *The King v. Davis and others*.<sup>(12)</sup> Information for an assault and riot, and a verdict for the defendants. *Tremain*, sergeant, moved for a

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(1) 3 Dallas, 515. Supra, p. 504.

(2) 8 Wendell, 549. Supra, p. 506.

(3) 2 Caines' Cas. Error, 319. (4) 1 Chit. Cr. Law, 654—658.

(5) 1 Bay, 372.

(6) 1 Nott & M'Cord, 346.

(7) 9 Wheaton, 579.

(8) 1 Hawks, 463.

(9) 1 Tenn. Rep. 334.

(10) Et vide 1 S. C. Con. Rep. 29. 1 Nott & M'Cord, 441.

(11) 2 Salk. 646.

(12) 1 Shower, 336. 12 Mod. 9.



new trial, upon affidavits of the fact, and that the judge's directions were, to find the assault. *Shower* opposed, because in a criminal proceeding, and no corruption or practice showed. And a new trial was denied, for that the court said there could be no precedent shown for it in case of acquittal.

Nor *conspiracy*, as in *The People v. Mather*.<sup>(1)</sup> The defendant was indicted as a conspirator, in the abduction of *William Morgan*. Several questions arose upon the evidence, in the progress of the trial, to the judge's decisions; upon which, and also to the charge of the judge, the public prosecutor took exceptions. The defendant was acquitted. After disposing of the several points urged by the counsel for the people, *Marcy, J.*, who delivered the opinion of the court, concludes—"The right of a court to grant a new trial, in case the defendant has been acquitted, is called in question by the defendant. That such right does not exist, where the ground of the application is, that the finding is against evidence, is conceded; but, whether a new trial can be granted, where the acquittal has resulted from the error of the judge, in stating the law to the jury, seems to be involved in much doubt. It is a very important question, and not necessary to be now settled; the court have, therefore, deemed it discreet, to forbear expressing an opinion on it, till a case shall arise requiring them to do so." Motion for a new trial denied.

Although the learned judge, in this case, pronounced the point doubtful, but avoided a decision, it may be deemed proper to remark, that the courts have uniformly inclined against the exercise of the power in felonies; and that to this class of cases, both in England and this country, we look in vain for a precedent. In the class of misdemeanors, *quo warranto* and *tithe* cases form an exception in

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(1) 4 Wendell, 229.

England, even where the verdicts are against evidence.(1) The other exceptions will be noticed hereafter.

Nor in cases of *perjury*. *Rex v. Bear*.(2) "In indictments of perjury," say the court, "we never do it because the verdict is against evidence ; but if you prove a trick, as no notice, &c., it is otherwise."

And in *Rex v. Reid*.(3) Indictment for perjury, and the defendant acquitted ; and a motion was made for a new trial, on behalf of the king, because several witnesses were absent. *Wyndham*, J., held this grantable, not being touching life, to which it was answered, that new trials may be in criminal cases at the prayer of the defendant, where he is convicted, not at the suit of the king where the defendant is acquitted, any more than in criminal cases which are capital ; and where two cases were cited *ex parte regis*, *Twisden* said, this was in the late troublesome times, *et ex assensu partis*.

And *Rex v. Bowden*.(4) an information for perjury, and the defendant acquitted ; and motion for a new trial, upon affidavit that one of the witnesses was absent by reason of sickness. *Per Curiam*.—"A party being acquitted may not be tried again, but after conviction a new trial may be had for the defendant, upon good cause.

And in *Rex v. Fenwicke & Holt*.(5) Information for perjury, and defendant acquitted. Motion for a new trial upon affidavit that some of the witnesses were kept away by the practice of the defendant. *Wyndham*, J., held this grantable, being only in a criminal case, not capital. *Keeling* said, no precedent could be shown of a new trial in a criminal case, any more than in a capital one, for the defendant's character shall not be drawn in question several times for the same thing, any more than his life."

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(1) Vide *Infra*.

(2) 2 Salk, 646. *Supra*, p. 515.

(3) *Levinz*, 9.

(4) *Levinz*, 9.

(5) *Levinz*, 9.

So, in *Reed v. Dawson*.<sup>1</sup> Information for perjury, found for the king. it was moved on several affidavits to have a new trial: and it was doubted by the court, that although cause appeared to them for granting a new trial, if they had power to do this without the consent of the king's counsel, and it seemed to them that they had not; but they agreed that in debt by an informer, the court might grant a new trial upon cause, without the consent of counsel, because there the party hath an interest.

And in *The King v. Price*.<sup>(2)</sup> The defendant had been tried and acquitted upon an indictment for perjury, and the prosecutor in person now moved for a new trial on the ground that the lord chief justice had refused to allow him to address the jury, and state the case for the prosecution. *Per Curiam*.—In a criminal prosecution, instituted for the interests of the public, in the name of the king, and not to gratify the objects of an individual, a prosecutor has no right to address the jury. Counsel indeed, who are in some measure under the control of the court, have this privilege allowed to them; because, from their professional education and habits of business, it is to be expected that they will not state to the jury any thing but what is fit for them to hear. Besides, the prosecutor may be, and generally is a witness: and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath; and *Bayley, J.*, added, that he remembered a case where Lord Ellenborough had allowed the prosecutor to address the jury, and afterwards, on being spoken to on the subject by the other judges, expressed his conviction that he had done wrong." New trial refused.

The exceptions are, first, in the case of an insufficient verdict; as in

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(1) 1 Siderfin, 49.

(2) 2 Barn. & Ald. 606.

*The People v. Olcott.*(1) Conspiracy. Verdict, "that there was an agreement between Roe and the prisoner to obtain money from the bank of New-York, but with intent to return it again." No other verdict could be had; whereupon the court, without the consent of the prisoner, ordered a juror to withdraw; and the rest being called, and only eleven answering, they were discharged. The counsel for the prisoner contended, that he ought to be discharged; and relied chiefly upon the allegation, that the verdict was sufficient. *Kent, J.*, on this point.—"This finding was so imperfect, that had it been received, the court could not have given judgment upon it, and would have been obliged to award a *venire de novo*. The jury ought to have found either a special verdict, stating the facts at large, and leaving the law to the court, or, by a general verdict, they ought to have affirmed or negatived the charge of a fraudulent intent. I am satisfied that this was no verdict of acquittal. If it had any operation, it would be against the defendant; for, in answer to the indictment, the jury have found the fact, that the defendant and Roe did agree together to obtain money from the bank, and they have not negatived the fraudulent intent. We are of opinion, therefore, on all the points, that the defendant ought not to be discharged."

So where the verdict is clearly against evidence, and the judge dissatisfied.

*The People v. Townsend.*(2) The defendant was convicted of perjury. Before judgment he absconded, and afterwards voluntarily surrendered himself, but no judgment was pronounced. The judge, before whom the prisoner was tried, reported to this court, that the verdict was given against evidence. *Per Curiam*.—"There must be a new trial; and the judge who is to preside at the next

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(1) 2 Johns. Cas. 301.

(2) 1 Johns. Cas. 104.

oyer and terminer, will communicate this opinion to the justices of that court. In the meantime, the prisoner must give bail for his appearance."

So, where the words stated in the indictment were not *material*, and such as would sustain a charge of perjury, the judgment was arrested. In *The State v. Hayward*,<sup>(1)</sup> speaking of the affidavit on which the perjury was charged, the court said, the materiality was not averred in the indictment, and therefore it was necessary to inquire, whether it appeared otherwise, from the face of the indictment. But it appeared from the indictment, that the affidavit was made to charge a felony on the defendant, acts which, unless they be referred to some act of guilt, were in themselves perfectly innocent, and the indictment did not make any such reference. The words, therefore, did not appear, on the face of the indictment, to be *material*, either by averment, or by the context of the indictment, or by their own import. The motion in arrest of judgment was granted on that ground.

And in *Rex v. Simmons*.<sup>(2)</sup> A new trial was granted for the defendant, in a criminal case, upon the report of the judge and affidavits of the jury, that the verdict was taken contrary to their meaning, and to the judge's direction in point of law. *Denison, J.*, observed—"The court will be very cautious how they grant new trials upon the affidavits of jurymen, because it would be of very dangerous tendency; but in this particular case, which partly depends upon my brother's report, and partly upon the affidavits of all the jurymen, I am very well satisfied there ought to be a new trial, because it appears, both by the report and affidavits, that this verdict ought not to stand, and that the jury were mistaken in giving a verdict contrary to

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(1) 1 Nott & M'Cord, 547. Supra, p. 340.

(2) 1 Wils. 329. Supra, p. 116.

the direction of the judge ; and that is what I principally go upon, that it is a verdict contrary to the direction of the judge in a point of law. One of the jury said, 'the defendant had no intent ;' then the judge said, 'you must acquit him ;' some of the jury swear they did not *hear*, others that they did not understand the judge."

In like manner where the defendant has been deprived of a fair opportunity of defending himself.

As in *The People v. Vermilyea and others*,<sup>(1)</sup> where the defendants had been precipitately hurried on to trial, and convicted of a conspiracy, and a postponement refused until they could procure the attendance of material witnesses, although they showed due diligence, the court granted a new trial. The counsel for the defendants had been asked to state what their witness would prove, and upon the district attorney's offering to enter into a stipulation to admit, the witness would make the statement as alleged, if present and sworn, but, not the truth of the statement, the court below had insisted upon the defendant's acceptance of the stipulation, and upon their refusal had put them on their trial. In disposing of the question, *Savage*, Ch. J., delivered the opinion.—"The practice of requiring concessions in such cases is novel, and I apprehend not well calculated to advance justice. But if it be encouraged, it seems to me that the prosecutor should admit all that the defendant can possibly obtain by the witness, which is the truth of the facts proposed to be proved. Such seems to have been the opinion of this court in *Brill v. Lord*.<sup>(2)</sup> Though this is comparing small things with great, still the principle is the same. The defendant before the justice by his oath was entitled to an adjournment. So were these defendants. The right of the defendant before the justice arose, under the statute, and the right of these defendants,

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(1) 7 Cowen, 369.

(2) 14 Johns. Rep. 341.

by virtue of the common law. Both laws are of equal obligation. When the defendants here and before the justice, had by their affidavits, brought themselves within the provisions of the law, there was no more discretion in the one case than in the other. The discretion of both was a legal discretion; the very same discretion which we are now called upon to exercise in deciding the present motion. Under these views of the rights of the parties, and the power and discretion of the court, I feel bound to say that an error was committed in compelling the defendants to accept of the offered stipulation; and of course, that a new trial must be granted."<sup>(1)</sup>

And if the defendant have resorted to trick or fraud to procure his acquittal, the verdict will be set aside. In opposition to this, it has been said, that if the acquittal in an indictment have been procured by a trick or fraud of the defendant, he may be punished for the trick or fraud, but that the court cannot grant a new trial.<sup>(2)</sup>

But in *Bear's case*,<sup>(3)</sup> cited above from Salkeld, it was stated, that if trick could be shown, it would avoid the verdict, in a case of perjury. And in a case in Sayer, *Rex v. Farzer*,<sup>(4)</sup> a new trial was granted, the cause having been brought on by surprise. And in *The Queen v. Coke*,<sup>(5)</sup> the acquittal being by surprise upon the prosecutor, for want of notice, it being brought on by the defendant, it was in Michaelmas term, in the third year of Queen Anne, on an indictment for keeping a common bawdy house, a new trial was granted.<sup>(6)</sup>

And, in *The Queen v. Sir Jacob Banks*,<sup>(7)</sup> who was indicted at the quarter sessions for an assault upon Mr. Cul-

(1) Vide 1 Chit. Cr. Law, 490. Gra. Prac. 246—248. 2 Arch. Prac. 210. (2) 6 Bac. Abr. 675. (3) 2 Salk. 646.

(4) Sayer, 90. (5) 12 Mod. 9.

(6) Vide 1 Shower, 336. 1 Levinz, 124. (7) 11 Mod. 33.

pepper, which was removed hither by the prosecutor, by *certiorari* ; the prosecutor not carrying it down next assizes, the defendant carried it down and tried it, and was found not guilty. It was moved to set aside the trial, there not having been any laches in the prosecutor. *Holt*, Chief Justice, said, it was his opinion, that where a prosecutor removes an indictment, it is very hard the defendant should, *volens volens*, carry it down the next assizes and try it, when, perhaps, the prosecutor cannot be ready with his evidences. Suppose it was for treason or felony, this would put the queen in a worse case than any subject. *Powell*, *Powys*, and *Gould*, Justices, agreed to what *Holt*, Chief Justice, said ; and that none of the precedents quoted by the *solicitor general*, who was counsel for the defendant, were above five years standing, and those passed *sub silentio*. So all were of opinion that a new trial ought to be granted.(1)

3. In hard actions, a new trial will not be granted, especially if the verdict be for the defendant, although against evidence.(2) Nor unless some rule of law be violated. Not in actions *ex delicto*.

*Smith v. Frampton*.(3) Case for negligently keeping the defendant's fire, by which plaintiff's house was burnt ; and, after verdict for the defendant, plaintiff moved for a new trial, upon a suggestion that the verdict was against evidence ; and he argued, that though it was a severe action, yet all actions were grounded upon reason. The court, after having considered this case several days, resolved, that this being a case of hardship, and the jurors being judges of the fact, no new trial should be granted ;

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(1) Vide 2 Ld. Raym. 1082. 2 Leonard, 110. 2 Salk. 652. 3 Burr. 1462.

(2) 2 Tidd, 916. Gra. Prac. 513.

(3) 1 Ld. Raym. 62.



though *Holt*, Chief Justice, before whom it was tried, was dissatisfied with the verdict.(1)

So if fraud is imputable to the plaintiff. *De Wütz v. Hendricks*.(2) The plaintiff had proposed to raise a loan for the Greeks, in arms against the government of the Porte. For this purpose he lodged with the defendant, a stock-broker, an instrument which was alleged to be a power of attorney, signed abroad by the *Exarch* of *Ravenna*, but which turned out to have been fabricated in *London*; and the defendant, at his request, procured to be engraved certain scrip receipts, bearing a stamp. Suspicions having arisen as to the accuracy of the plaintiff's representations, the project for a loan failed. The plaintiff sued in trover for the papers, and the jury found a verdict for the defendant. The plaintiff moved for a new trial, on the ground, that even if a fraud were contemplated, it did not deprive him of his own papers. *Best*, Ch. J., who tried the case — "It appeared that placards had been stuck up in the city, stating that the plaintiff was not authorized by the Greek government to raise any money, and that he had been informed, that on account of what was stated in these placards, no money could be raised for him. The power of attorney, which, it was pretended, was sent from Greece, was proved to have been manufactured in this country, but by whom it was executed did not appear. I told the jury, that with respect to the power of attorney, there was no evidence that any instrument of that description had ever come to the hands of the defendant; for, by power of attorney, in the declaration, must be understood, an instrument duly executed as a power of attorney. I further said, that if the plaintiff was attempting a fraud on the public, by raising money, on the false pretence of pledging the

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(1) Et vide 2 Salk. 644. 648. 653. 5 Term Rep. 430. 3 Taunt. 1.

(2) 2 Bingham, 314.

Greek government for its repayment, and, in furtherance of that attempt, delivered these papers to the defendant, he could maintain no action to recover them back. The jury, to my entire satisfaction, found for the defendant." The motion was denied.

So, if a fraudulent defence, and verdict for plaintiff, as in *Culver v. Avery*.<sup>(1)</sup> Action on the case for false and fraudulent representations, made by the defendant to the plaintiff in a sale of lands, as to incumbrances. The jury gave a verdict for the plaintiff, which the defendant moved to set aside. *Sutherland, J.*—"The finding of the jury disposes of the question of fraud. They have pronounced the defendant guilty of the false and fraudulent representations alleged in the declaration, and that they were made with the fraudulent intent to deceive and injure the plaintiff. A verdict must be most clearly and manifestly against evidence to justify the court, in an action like this, in setting it aside. This is not a case of that description. Whatever may be the opinion of the court upon the strict weight of evidence, as it appears on the case, the jury, whose province it was to weigh and pass upon it, and who saw and heard the witnesses, have thought the preponderance against the defendant. I should have been inclined to a different conclusion; but the jury not only had the right, but were more competent, fairly and discreetly, to decide the question, than we are. Their decision cannot be disturbed."<sup>(2)</sup>

Nor in actions for *crim. con.*, *fraud*, *malicious prosecution*, *slander*, *seduction*, nor *trespass*, as has been already shown, except there be some rule of law violated.<sup>(3)</sup> Nor, although there may have been a departure from strict law, if the verdict be for the defendant.<sup>(4)</sup>

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(1) 7 Wendell, 380.

(2) Vide ante, 288—301.

(3) Vide supra, Verdicts against Law, 326—334. Against Evidence, 371—374. And for Excessive Damages, 410—437.

(4) Vide supra, 353.

A very late case in the supreme court will furnish the only additional example illustrative of the general rule, although applicable to one of the classes of hard actions only. *Rundell v. Butler*.<sup>(1)</sup> Action for a libel, consisting of some doggerel rhymes, which the plaintiff alleged the defendant had caused to be composed and published, with intent to cause it to be believed, that the plaintiff had been guilty of proposing to his brother *Hardy*, to unite with him to murder their brother *Jehu*, who had been murdered accordingly. The defendant pleaded the general issue. After proof of publication, the defendant offered to prove, in mitigation of damages, that it was the general report, that the facts contained in the verses declared on, were as therein stated. The plaintiff's counsel consented that such evidence should be given. The jury found a verdict for the defendant, which the plaintiff now moved to set aside, on the grounds that it was against the weight of evidence, and that the judge admitted improper, and rejected proper testimony. By the court, *Savage*, Ch. J.—“The publication of the libel was proved, and I am inclined to think the verdict was against the weight of evidence; but I do not deem it necessary to analyze the testimony, as it is not of course that a new trial should be granted in this case, although the verdict be against the weight of testimony. In *Jarvis v. Hatheway*,<sup>(2)</sup> it was held by this court, that in penal actions, and actions for libel and defamation, a new trial will not be granted to the plaintiff, unless some rule of law has been violated in the admission or rejection of testimony, or in expounding the law to the jury.” The learned judge having noticed the introduction of proof of a general report, that the facts were as contained in the libel, and the acquiescence of the plaintiff's counsel, proceeds—“Assuming, therefore, what was conceded by the

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(1) 10 Wendell, 119.

(2) 3 Johns. Rep. 180.

plaintiff's counsel, that reports were admissible, charging the plaintiff with the crime imputed in the libel, the evidence offered was proper. If a defence of this kind was admissible in mitigation, any reports of the same character were proper, and would mitigate in proportion as they approached a justification. The reports proved, and the facts stated by the witnesses, would not sustain a charge of murder, but they were such as would only have warranted a verdict for nominal damages. There was no error of the judge, therefore, in the admission of testimony, under the law of the case, as agreed by the parties.—The cause was fairly submitted to the jury, and the only error they committed, was returning a verdict for the defendant, instead of finding a verdict for the plaintiff, with nominal damages. A new trial ought not to be granted, under such circumstances.”(1)

In all cases of this kind, the hardship of the defendant on the one hand, and the almost boundless latitude given to the jury on the other, unite in controlling and retaining the verdict, whether mitigating the damages, or directing an entire acquittal, against the strict right of the case. The rigid application of the rule must, in some instances, work injustice to the plaintiff, but they are of minor consideration, compared with the flood of evils that must deluge the practice, were the courts to adopt a different course. This, however, ought, in justice, to be confined to cases where the defendant puts himself upon the general issue. There the verdict, while it acquits the defendant, throws no odium upon the plaintiff; and although he may have suffered in his feelings and his hopes, yet he has lost nothing in point of character. But it is entirely different where the defendant puts himself upon his justification. In that case the hardship changes sides, and an unrighteous verdict not

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(1) Vide *supra*, 347—350, and 401—404.

only defeats the just expectations of the plaintiff, but fastens upon him a lasting injury. Here the equity of the rule is with the plaintiff, and all the reasoning urged on behalf of a defendant, under other circumstances, is strictly applicable to him. And yet the distinction, though manifest, does not appear to have found its way into the practice, so strongly marked as to give the benefit of the rule, with all the weight of a well settled principle, to the plaintiff. The defendant, by a train of decisions and a long course of practice, stands out in bold relief; while the plaintiff is wholly overlooked. He must be contented, therefore, in the present state of the practice, to put himself upon the general undefined discretion of the court, and to encounter the prejudice of a rule amplified by construction into a shield for the protection of the defendant, by far too broad for a due administration of justice.

4. In penal actions, unless there be some palpable violation of law, the verdict will not be set aside, if for the defendant. Thus,

In *Seymour v. Day*.<sup>(1)</sup> The action was for the penalty in killing a hare, not being qualified; and the jury found for the defendant, contrary to the direction of the judge. But the court refused a new trial, saying it had never been carried so far as a penal action.

*Philips, qui tam, v. Scullard*.<sup>(2)</sup> An action brought for £50 penalty, for selling half a pint of cherry brandy. The fact was proved, upon the trial, to be done by defendant's wife; but several circumstances appeared to show, that she was unwarily drawn in by false pretence. Lord Chief Justice *Eyre*, who tried the cause, directed the jury to find for the plaintiff, but they found for defendant, contrary to evidence. *Belfield* moved for a new trial, and a

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(1) 2 Str. 899.

(2) Barnea, 435.

rule *nisi causa* was granted, but was afterwards discharged upon showing cause, the action being hard, and the case having been represented to the commissioners of excise, who refused to direct a prosecution.

So, in *Jervois, qui tam, v. Hall*,<sup>(1)</sup> upon the game act, for killing a hare. Verdict for defendant, and motion for a new trial, because the judge who tried the cause refused to admit a person to be a witness, who was a parishioner of the same parish where the hare was killed. But *Lee*, Ch. J., said he did not remember that ever a new trial had been granted in the case of a penal action, and so, *Per Curiam*, the motion was refused.

So, in *Mattison, qui tam, v. Allanson*,<sup>(2)</sup> an action brought upon the statute against horse-racing, for the penalty, and verdict for defendant contrary to evidence; and the court denied a new trial, there being no proof of any misbehaviour in the defendant, or tampering with the jury. It was said, this was within the reason of cases in the exchequer, where verdicts for defendants are never set aside for penalties in the case of duties, and this is excepted out of the statute of jeofails, as much as indictments.

And, in *Fitch, qui tam, v. Nunn*.<sup>(3)</sup> This was an action brought on one of the penal statutes, made to preserve the game, wherein the defendant obtained a verdict. Plaintiff moved for a new trial, and the judge, before whom the cause was tried, reported the verdict to be contrary to evidence. Notwithstanding which, the rule to show cause why a new trial should not be had, on payment of costs, was discharged; because no instance could be shown where, in an action on a penal statute, in which a verdict was found for defendant, a new trial had ever been granted.

So, also, in *Robinson, qui tam, v. Lequesne*.<sup>(4)</sup> Upon an

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(1) 1 Wils. 17.

(2) 2 Str. 1238.

(3) Barnes, 466.

(4) Bunbury, 253.

information of seizure of Jesuit's bark, on the statute for fraudulent exportation of Jesuit's bark, two casks out of six being dust. There was a verdict for the defendant, and now a motion was made for a new trial. But, *Per totam Curiam*, it was denied; however, it seemed to be admitted in a case of this nature, a new trial might be granted, if the fact would have admitted of it, and the counsel for the plaintiff were prepared with precedents, if they had been called for, to that purpose.(1)

In *Fonereau v. Bennett*,(2) an action upon the statute against bribery, there was a verdict for the defendant. *Forster* moved for a new trial, as being against evidence. But, *Per totam Curiam*.—"We never grant new trials in actions on penal laws, and it has been so held for more than fifty years past."(3)

So, in *Ranston v. Etteridge*,(4) where the verdict was for the defendant, in an action against a postmaster, for penalties. *Raine* moved to set aside the verdict, and have a new trial. He admitted the general rule, that where the defendant has obtained a verdict in a penal action, a new trial will not be granted; but this case was attended with particular circumstances. The conduct of the jury may be more outrageous and mischievous than the judge's misdirection; and it is not laid down generally and exclusively, that a new trial will be granted in no case, except for a misdirection. The court had never said that a new trial should not be granted, for such an error as that of which the jury had been guilty. He was about to enter upon the facts, but *Abbott*, Ch. J., said that there was a preliminary objection, which should be disposed of first. He referred to *Brook v. Middleton*,(5) and observed, that the doctrine

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(1) Vide supra, 334.

(2) 3 Wils. 59.

(3) Et vide 10 East, 268.

(4) 2 Chitty's Rep. 273.

(5) 1 Campb. 450.

held in that case had not been adopted without consideration. Without saying that the hands of the court are in all cases tied down, his lordship added, that the court will not interfere, without express proof of misconduct in the jury.

In *Comfort v. Thompson*,<sup>(1)</sup> the rule was recognised in an action for a penalty before a justice. It was held, that where a verdict is found, and judgment given for the defendant, the court will not reverse the judgment, because the verdict was clearly against evidence, there being no irregularity alleged.

So in *Steel, qui tam, v. Roach*.<sup>(2)</sup> Information filed on the revenue laws, and verdict for the defendant. A motion was afterwards made for a new trial; but the court, after full argument, discharged the rule, upon the ground of this being a *qui tam*, or *penal* action, in which the court will seldom grant a new trial, as this kind of penal actions was considered hard and rigorous.

5. The same rule extends to cases in their nature penal, whether the forms of proceedings be by action or indictment, as in the case of not repairing a highway.

*Rex v. Parish of Silverton*.<sup>(3)</sup> Indictment for not repairing the highway, and a verdict for the parish. It was now moved for a new trial, for misdirection, or overruling evidence at the trial, by reason whereof the parish were unduly acquitted. *Per Curiam*.—"This is a criminal case; and new trials are never allowed, where the defendant is acquitted, in a *criminal* case. So, also, it is in *qui tam's*, and informations in nature of *quo warranto's*."

So in *Rex v. Edwards*.<sup>(4)</sup> A motion, in a criminal case, was put off, till the validity of a rate should be tried

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(1) 10 Johns. Rep. 101. Supra, p. 397.

(3) 1 Wils. 298.

(2) 1 Bay, 63.

(4) 4 Burr. 2257.



in a feigned issue, "whether it was an equal or partial one." A verdict having passed for the defendant upon the issue, *Dunning* moved for a new trial, the verdict having been given contrary to evidence. But the court were clear against granting the motion, because it was within the same reason as if it had been in a criminal prosecution; for, as this issue was directed in order to know whether this was an illegal and partial rate; if it had been found to be partial, the consequence would have been, either an attachment or an information. It was just the same thing as if it had been a verdict found for the defendant, upon an information; and if it had been upon an information, the court would not have set aside the verdict, and granted a new trial, although the acquittal had been contrary to the weight of the evidence.

So, a new trial was refused in *The King v. Reynell*.<sup>(1)</sup> This was an indictment for the non-repair of the fences of a church-yard, which it was alleged that the vicar had been immemorially bound to repair; by means of which, swine and other cattle broke in and rooted up the tombstones, and dirtied the porch of the church and the paths leading to it, to the nuisance of the inhabitants of the parish. At the trial, there was a verdict for the defendant, which *Marryat* moved to set aside, and to have a new trial, upon the ground that the verdict was against all the evidence. He admitted, however, that he had not been able to find any precedent, where the court had granted a new trial in case of a misdemeanor, where the verdict was for the defendant; but he contended, that this was in effect only a trial of a civil right, namely, the liability to repair, though in the form of an indictment, there being no other mode of trying the right in a case of this sort. But, per Lord *Ellenborough*, Ch. J.—"It is very clear, that you may indict the defend-

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(1) 6 East, 315.

ant again, if the fences have continued out of repair since the last indictment; and that is much better than for us, in a case of such minor consequence, to make a precedent of so much importance, which may affect other cases of misdemeanors."

And in *Rex v. Mann*,<sup>(1)</sup> a new trial was refused, after verdict for defendant, upon not guilty to an indictment for a nuisance to a highway. And, per Lord *Ellenborough*, Ch. J.—"Unless you can point out some distinction between the case of nuisance and other criminal cases, the general rule is, that we do not grant a new trial upon an indictment for a misdemeanor, where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right; yet it is, in form, a criminal proceeding, and may subject the defendant to be punished criminally." And his lordship referred to *Rex v. Reynell*.<sup>(2)</sup>

In cases of *quo warranto*, it was at one time doubted, whether the court could interfere, and in *The King v. Bennett*,<sup>(3)</sup> argued before all the judges of England, they stood equally divided on that question.

The case of *Rex v. Bell*,<sup>(4)</sup> went off upon another point. It was an information, in nature of a *quo warranto*, brought against the defendant, to show by what authority he claimed to be a common-council-man of Marlborough; and there was a verdict for the defendant. The prosecutor moved for a new trial, as being a verdict against evidence, and referred to the report of the judge, and insisted he was not too late, there being no judgment yet signed. But the court would not suffer the merits of the motion to be gone into, on account of the length of time since the verdict, it

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(1) 4 Maule & Sel. 337.

(2) 6 East, 315.

(3) 1 Str. 101.

(4) 2 Str. 995.

being possible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit, after a verdict establishing his right; and it would be much less mischief to let this verdict stand, supposing it to be wrong, than introduce a general inconvenience.

But in *Rex v. Francis*,<sup>(1)</sup> a verdict having been found for the defendant, in a *quo warranto* information, to show by what authority he claimed the office of alderman of *Cambridge*, a new trial was moved for, on the ground that the verdict had been given against the weight of evidence. The court granted a new trial, saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange*, in which a new trial had been granted.<sup>(2)</sup>

Another exception to the rule in England, is illustrated in *Lord Selsea v. Powell*,<sup>(3)</sup> being an action of debt on the statute, for not setting out tithes, on the ground that, although prosecuted as a penal action, it is founded on an act intended to be remedial.

6. But in penal, and even criminal actions, if the conviction be against law, or the direction of the judge, being conformable to law, a new trial will be granted.<sup>(4)</sup> Thus,

In *Wilson v. Rastall*.<sup>(5)</sup> An action on the bribery act, and verdict for defendant. Upon an application for a new trial, it was at first doubted by the court whether there was any instance of a new trial having been granted on a penal action, where the defendant had a verdict. But after a

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(1) 2 Term Rep. 484.

(2) Et vide 1 Term Rep. 575.

(3) 6 Taunt. 297.

(4) Vide supra, 334.

(5) 4 Term Rep. 753. Supra, 263. 396.

very full examination of the question, aided by an elaborate argument, the court made the rule absolute. In delivering his opinion, *Buller*, J., takes occasion to remark upon the case of *Jervois v. Hall*.<sup>(1)</sup> "Then as to the other ground, I know of no case, except that of *Jervois v. Hall*, in which the court has ever refused to grant a new trial, which was moved for on account of the misdirection or mistake of the judge. And the note of that case in 1 Wilson, is much too loose to be relied on. It is not stated whether or not the court even granted a rule to show cause; at all events the question was not agitated, whether the witness who was rejected at the trial, might or might not be examined. I think that the witness there was properly rejected, because he was interested. But if the court proceeded on the ground that the witness was a competent witness, and yet refused to grant a new trial, I think the case itself is not law."<sup>(2)</sup>

And held in *Calcraft v. Gibbs*,<sup>(3)</sup> cited above, that a new trial may be granted after verdict for defendant in a penal action, if the jury have been misdirected in point of law. The question arose whether, in this form of action, title could be tried, and the jury having found against the law, the court directed a new trial. Per *Grose*, J.—"All that the courts have hitherto said upon this subject is, that if there be a fair colourable title in the party, they will not suffer it to be tried in this form of action. But were we to go further, and declare that, because a defendant acted *bona fide*, it was a sufficient excuse in this action, it would operate almost as a total repeal of the statutes inflicting these penalties. Therefore, whether the defendant acted

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(1) 1 Wils. 17.

(2) Vide 2 Barn. & Ald. 606. 17 Mass. Rep. 514.

(3) 5 Term Rep. 19. *Supra*, p. 265.

*bona fide* or not, if he had no colour of title, it could never be a proper consideration to be left to the jury ; and the verdict which proceeded on such misdirection, in point of law, must in consequence be set aside.(1)

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(1) Et vide 8 Price, 301. 2 Bay, 466. 1 Camp. 450, *et in notis.*

## CHAPTER XV.

### AFTER TWO TRIALS AND TRIALS AT BAR.

THE same principles of justice, which require there shall be a second trial, will sometimes render it necessary to have a third, or more. Whatever opinion may have been formerly held on this subject, it is now well settled, that the power and discretion of the courts extend to all instances of unjust verdicts, whether they are rendered for the first, second or third time, or oftener, in the same cause. This power, courts are inclined to exercise with great caution, for if used too freely, it would virtually supersede the trial by jury, the only difficulty to be encountered in applications of this kind. The granting or refusing the motion, when there has been more than one verdict, is so entirely a matter of discretion, that nothing deserving the name of general rules, can be adduced. The only principle of universal application is, that new trials will be granted, without reference to their number, so long as substantial justice may demand it, or rather so long as it may be necessary to defeat manifest injustice. Should unprincipled jurors, therefore, find palpably in the face of evidence, or in defiance of the law, the court has the power, and will exercise it, to control and avoid their perverse verdicts, until a result shall have been produced, conformable to justice and right reason ; a power which no lover of justice would wish to see crippled or narrowed, and without which, verdicts, in numberless instances, in civil actions at least, would most signally trample upon justice. But although no rule can

be supplied, adequate to every emergency, there are precedents even here, tending to regulate the discretion of the court, in most cases that are likely to happen.

These may be adduced and illustrated, whether they apply to cases tried at *bar*, or cases tried more than once by jurors at *nisi prius*.

1. It was formerly held, that after a trial at *bar*, a new trial would not be granted ; but the modern practice knows no distinction, in this particular, between trials at *bar* and at *nisi prius*. They will, in either case, be granted or refused a second time, for the same reasons.(1)

Thus, in *Gay v. Cross*.(2) The plaintiff brought an action on the case for a false return to a *mandamus*, to swear him common-council-man. By charter, the manner of their election was chalked out ; and a usage was given in evidence, to a jury at the *bar*, that the election had gone quite contrary. The counsel, on both sides, consented to have it found specially, and to have it determined by the court, whether such a by-law, and a long usage pursuant to it, could alter the direction, or rather, annihilate the direction of the charter. The jury, having given their verdict in private over night, said that they had found the matter specially ; and the next day, in court, delivered their verdict for the defendant generally, and would give no reason for it, nor be moved to depart from it. The court were very much dissatisfied with the jury ; and *Holt*, Chief Justice, said he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a judge's desire, declare the reason which had induced them. That as the judge's publicly declare the reasons of their judgments, and thereby expose themselves to the censures of all that be learned in the law, and yet

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(1) 2 Jones, 225. Carth. 507.

(2) 7 Mod. 37.

there is no law obliges them to it, but it is for public satisfaction ; so the jury ought, for the same reason, to declare the reason of their verdict, when required by the court. Yet, notwithstanding all this, it being a trial at bar, the court would not grant a new trial.

In *Fenwick v. Lady Grosvenor*,<sup>(1)</sup> in ejectment. After a trial at bar, a new trial was moved for, on affidavits that several witnesses absented themselves in Holland, by reason of a report spread abroad there, that one of the defendants' witnesses was confined by imprisonment ; but it was denied, because it did not appear that the plaintiff did spread it, or occasion the spreading of it. The court was dissatisfied with the verdict, but cited *Cross's case*, for a false return of a *mandamus*, tried at bar ; and by consent of all sides, one point was to be found specially, yet the jury found a general verdict, and the court would not grant a new trial, saying, " It has never been done here, but upon issues out of chancery, which, being only to satisfy the conscience of the chancellor, are not *stricti juris*."<sup>(2)</sup>

But, in *Bright v. Eynon*.<sup>(3)</sup> Lord Mansfield observes — " Of late years, new trials have been granted, not only after trials at *nisi prius*, but also after trials at bar. And it is at least equally reasonable to do it, after trials at bar, as after trials at *nisi prius*, if the justice of the case demands it ; or, indeed, rather more so, as the latter must be done upon what could have actually and personally appeared to a single judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the whole court."

In *Sir Christopher Musgrave v. Nevinnson*.<sup>(4)</sup> The corporation were all invited to a treat, when one of the

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(1) Vide Holt, 703. 2 Salk. 650. 7 Mod. 156.

(2) Et vide Ibid. 70. 121. 1 Salk. 258. Holt, 265.

(3) 1 Burr. 390, *ut supra*, 342.

(4) 1 Str. 584. S. C. Ld. Raym. 1358.



aldermen desired leave to resign ; upon which, his resignation was taken, and the plaintiff, at the same time, chosen and sworn in. On a trial at bar, the jury found it a good election ; and the court granted a new trial, it being fraudulent, and it appearing one of the members was not there till after the election, and there was no summons to meet to do such a corporate act, that the members might come prepared. The meeting, likewise, was not in the *Moothall*, but at a tavern, and it was a plain surprise. As to the point of its being a trial at bar, the court made no difficulty of that ; since the case of *Bewdly*, and another of *Sir Joseph Tyley v. Roberts*, in C. B., where, on a trial at bar, whether *compos* or *non compos*, the jury found against the weight of the evidence, and there was a new trial. The court added, the case in *Stiles*,<sup>(1)</sup> which is the first new trial in print, was after a trial at bar ; and in the case of an alderman of Derby, who was afterwards ousted upon a *quo warranto*. *Et per Raymond*, Judge.—“ My Lord Chief Justice Holt used to say, he was of opinion, that the practice of granting new trials was much ancients than the case in *Stiles* ; since we meet with challenges, that the party was sworn on the former trial, and, therefore, ought not to be a juror again.” And new trial granted.<sup>(2)</sup>

And in *Chambers v. Robinson*,<sup>(3)</sup> where, in an action for a malicious prosecution of an indictment for perjury, it appeared the perjury was ill assigned, so that the now plaintiff could not have been convicted, and he was acquitted without examination of witnesses. The jury found for the plaintiff, £1000 damages. The defendant had a new trial, by reason of excessive damages, and the second jury found the same amount as the first. The defendant

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(1) *Wood v. Gunston*, *Styles*, 466.

(2) Vide 2 Salk. 648. *King v. Foster*, *T. Jones*, 224.

(3) 1 Str. 691. *Supra*, p. 444.

again applied to the court for relief, and was answered that he could not have another trial, and the rule was discharged.

So, in *Smith v. Parkhurst*.<sup>(1)</sup> Upon a trial at bar in ejectment, the parties agreed to a special verdict, as to a point of law arising upon a family settlement. But there being a question of fact, in which they did not agree, that was left to the jury, who found it for the plaintiff, against the weight of the evidence. The defendant moved for a new trial, and three objections were made: 1. That it was after a trial at bar; 2. That it was in the case of a special verdict; and 3. That it was in ejectment. These points were solemnly argued at the bar, and the court took time to consider of them. And as to the first, the court held, that in the case of a verdict against evidence, its being a trial at bar was no objection to a new trial, which had been granted in the case of *Bewdly*, and in the case of *Sir Christopher Musgrave v. Nevinson*. And they made the rule absolute.

With us, in the State of New-York, where the judges of the supreme court sit only in bank, and other judges are appointed to hold sittings at *nisi prius*, such a distinction as that contained in the rule can hardly be said to exist. The court, however, is not therefore divested of the power. Although, by the practice, its judges have ceased to travel the circuit, they may, and sometimes do, for special causes, order trials at bar.

2. After two concurring verdicts, the court will not grant a new trial, if the question to be tried wholly depend upon matters of fact, and no rule of law violated, although the verdict be against the weight of evidence.<sup>(2)</sup>

Thus, in an *Anonymous* case,<sup>(3)</sup> *Holt*, Ch. J.—“When

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(1) 2 Str. 1105.

(2) *Supra*, p. 380.

(3) 11 Mod. 1.

a trial has been twice had on the same issue, and both verdicts agree, it would be unreasonable to grant a new trial."

So, in *Swinerton v. Marquis of Stafford*.<sup>(1)</sup> Although the evidence was conflicting, new trial refused. A third trial was moved for by the plaintiff, on the ground that the verdict had been found a second time for the defendant, against evidence. *Mansfield*, Ch. J.—"I think it is impossible, in this case, to grant you a rule. Upon the last occasion, we went as far as we could go, because it was an important case, and decided the right to the inheritance of this land, which was to be assigned in lieu of common. On the former trial, *Williams*, sergeant, strongly insisted to the jury, on the grant of common, to the priority of *Stone*, whose property afterwards came to Lord Stafford, and we thought it might have prejudiced the minds of the jury, though it was rejected. If it had been evidence, it would have been decisive of the matter; but we thought the cause not sufficiently understood, and sent it to a new trial. The jury, who are the competent judges, have again had the case before them, and have decided it. Even if, on nicely scrutinizing all the evidence, we had a doubt whether the verdict was right, it could be never right for us to make no weight of two verdicts of a jury, in order to take the chance of a third."

So, in *Talcot v. The Commercial Insurance Company, and also the Marine Insurance Company*.<sup>(2)</sup> There were two causes, and the court had granted new trials in each, considering the verdicts as against evidence, as to the fact of seaworthiness. The causes having been again tried, verdicts were a second time found for the plaintiff. On the second trial, the only additional evidence, on the part of the plaintiff, was, that the vessel, in going down Connecticut river, struck on a bar of sand, so as slightly to impede

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(1) 3 Taunt. 232.

(2) 2 Johns. Rep. 457.

her course. A motion was now made for another new trial. But, *Per Curiam*.—"Here have been two trials in each of these causes, on the same question of fact. As four different juries have found that the vessel was seaworthy, and on the last trial, some further evidence was adduced on the part of the plaintiff, we do not think it expedient to disturb the verdict. The rule must be denied." (1)

And, in *Fowler v. The Ætna Fire Insurance Company*. (2) There had been three trials in this case, which was on a policy, arising out of the difficulty occasioned in affixing a meaning to a clause in the policy, the subject of insurance, "a two story frame house filled in with brick." The jury rendered a verdict for the plaintiff, in all the trials, which was chiefly relied on in a motion now made to set aside the third verdict, and grant a new trial. The court, by *Sutherland, J.*—"Two new trials have already been granted in this case; this is the third verdict which the plaintiffs have had in their favour. When the case first came before us, (3) we held that the description in the policy, of the house which contained the goods insured, as a frame house filled in with brick, amounted to a warranty that it was a house answering that description, and that the plaintiffs could not recover, unless the proof strictly sustained the warranty.—The evidence, upon the question whether the house was in fact filled in with brick, is not essentially different from what it was on the preceding trial. I still think the verdict on this point is against the weight of evidence, but after two concurring verdicts, in a case where there were many witnesses and a great deal of testimony on both sides, upon a mere question of fact, supposing there was no misdirection, I should not think it a discreet exer-

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(1) Vide 2 Johns. Rep. 124.

(2) 7 Wendell, 270. Supra, p. 386. (3) Vide 6 Cowen, 673.

cise of the power of this court, again to interfere with the finding of the jury."

In *Barrett v. Rogers*,<sup>(1)</sup> Case against the defendant as master of the brigantine *Governor Sumner*, for merchandise conveyed to the plaintiffs. At the first trial, the jury were discharged, not agreeing. The case was committed afterwards to two juries, and verdicts for the defendant in both. The plaintiffs now moved for a new trial, for the misdirection of the judge, who had charged the jury, that the bill of lading, signed by the defendant, was not conclusive evidence that the goods were in good order when received on board. *Sedgwick, J.*—"That the bill of lading is *prima facie* evidence, and of the highest nature, there can be no doubt; but that it cannot be conclusive in all cases, and among others, in such a case as the one before us, is equally clear. The ground of the result, to which the jury came, may not be very intelligible; but as two juries have concurred in it, we think, on that account, the verdict ought not to be disturbed; and more especially, as no objection is made to it, as being against evidence."

In *Clemson v. Davidson*,<sup>(2)</sup> in replevin, for a quantity of flour. There had been two trials, and verdicts in both for the plaintiff, against the inclination of the court. The defendants now moved for a new trial, on the ground that the verdict was against evidence. Two points were made to the jury; whether the flour was actually delivered, and if delivered, whether the contract was afterwards rescinded, by consent of both parties. And, *per Tilghman, Ch. J.*—"The evidence of a delivery was so strong, that I cannot suppose the jury had any hesitation on that point. As to the rescinding of the contract, it appeared to me, that the evidence inclined considerably in favour of the defendants, because Davidson refused to give an order for the re-

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(1) 7 Mass. Rep. 297.

(2) 5 Binn. 392.

delivery of the flour, and declared that he would do no acts by which any one creditor should obtain a preference. But I cannot say that the conduct of Davidson was altogether consistent, or that there was no evidence which went towards rescinding the contract. The contract might have been rescinded without a written order for re-delivery ; and as this is the second verdict in favour of the plaintiffs, on a matter of fact, I do not think it proper to order a third trial. But it is not to be concluded, that the court have not power to direct a third trial of matters of fact. There is no such rule. The court undoubtedly possess the power, and cases may occur in which it may be necessary to exercise it. Two verdicts on the same point are entitled to great weight ; and, unless they are attended with extraordinary circumstances, I have ever thought that they ought not to be disturbed. Where juries persist in violating the law, the case is different. We have several times granted a third trial, and there is no reason why we should stop there.”(1)

And, in *Frost v. Brown*.(2) Trespass to try title. There had been two verdicts for the plaintiff. The present was, therefore, a motion for a third trial, when all the grounds which had been taken, on the first and second trials, were again urged by the counsel on both sides. On this motion, the only material difference was, the last ground taken on the second trial, that the plaintiff had lost his right of entry, as he had not commenced his action within sixty years. This was a new ground, and the first time it had been taken in the judicial history of this country. The court, by *Waties, J.*—“The doctrine of law, respecting new trials, has been so frequently considered, and the rules on the subject so fully settled and understood, that it appears to me, nothing now remains in the discretion of the judges

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(1) Vide *Walker v. Smith*, 4 Dallas, 389.

(2) 2 Bay, 133.

but to make an application of these rules to any particular case that may come before them. After having exercised my judgment in this manner, I am of opinion, that the defendant is not entitled to another trial." After a review of the testimony, the learned judge concludes—"After all, if the objections to this verdict had much more weight with me than they have, yet I would not disturb this last verdict, for another reason. A second trial has already been granted, and two special juries have concurred in finding the same facts. I think we have no authority to proceed any further. For, although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries, yet, in a case where the law is complicated with facts, so that the construction and application of it must depend on the finding of facts, two concurrent verdicts, even against the opinion of the judges, ought to be conclusive. As the present case appears to me to be such a one, I think a third trial ought not to be granted."<sup>(1)</sup>

So, in *Peay v. Briggs*.<sup>(2)</sup> Assumpsit on a note of hand, given for the consideration of a tract of land. The defence was, a deficiency of land, for which the defendant claimed a deduction. There had been two trials, and verdicts in both for the plaintiff, making a partial deduction. The defendant moved for a third trial, on the ground that the jury ought to have made a further deduction. Nott, J., delivered the opinion of the court. After a brief notice of the facts of the case, favourable to the defendant, the learned judge concludes—"There are, nevertheless, many reasons in this case, why the verdict should not be set aside. This is the second verdict, equally unfavourable to the claim of the defendant; and it is not probable, that he would be more successful, were the case to be sent back.

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(1) Vide *Furman v. Gilman*, 2 Nott & M'Cord, 189. *in notis*.

(2) 2 Nott & M'Cord, 184.

The witnesses differed very widely with regard to the value of the land, and in all probability, the difference, in any event, would not be enough to pay for the trouble and expense of another trial. The plaintiff must always have a verdict for something ; and after two concurrent verdicts, there must be manifest error or injustice to induce the court to grant a second new trial."

3. After two verdicts, whether concurring or contradictory, a new trial will be refused, if the latter verdict appear, upon the whole, to answer the *ends of justice* ; but if against law, and the justice of the case, the motion will be granted.

*Montgomery v. The Attorney General*.<sup>(1)</sup> In this cause, there had been one trial at bar, and verdict in the common pleas in favour of the will ; and a subsequent trial at bar, and verdict before the court of king's bench against the will, and in favour of the heir at law. Mr. *Attorney General* now moved for a new trial, because, this being the case of an inheritance, it is not to be bound by one trial ; nor where there are two trials, and verdict against verdict. *Hardwicke*, Lord Chancellor.—"The judges of the court of kings bench, before whom the last trial was, have certified to me, that they are not only not dissatisfied, but quite satisfied with the verdict, against which a new trial is now prayed ; and as they are so, I have reason to be so too, and cannot take it that any thing improper passed at the trial. If there is any ground for a new trial, it must arise from collateral circumstances, and not from such as were submitted in evidence before the last jury. It is insisted for the new trial, that here is verdict against verdict. But this is no reason why a third trial should be granted ;

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(1) 6 Mod. 388.



for a trial at bar is a most solemn act, and ought to have more weight than a verdict at *nisi prius*. But it is not singly the difference of the two trials, but the weight of the new evidence appearing in the last trial, which was granted upon fresh evidence. I thought this fresh evidence so very material, that I granted the heir at law an opportunity of having them submitted to the scrutiny of a jury.— This evidence, it seems, has had the same weight with the special jury, and the court of king's bench, as with me ; which gives a further sanctity to this verdict, besides the solemnity of the trial." And new trial refused.(1)

So, in *Parker v. Ansel*.(2) Trespass, to try the right of a fishery in Surrey. When first tried, there was a general verdict for the defendant ; but the same was set aside, and a new trial granted, because he had given no evidence in support of two of his pleas, upon which issue was taken. On the second trial, before Lord *Mansfield*, there was a general verdict for the plaintiff, and, on a motion for a new trial, Lord *Mansfield* reported the evidence, which clearly established the second verdict. But it was insisted, that there having been two contrary verdicts, the defendant was by law and constant practice entitled to a third trial. And it was adjourned over to make inquiries after precedents : and no precedent being shown to establish such a doctrine, it was declared by *De Grey*, Ch. J., and *totam Curiam*, that they knew of no such rule, either at law or even in equity. And the rule was discharged. (3)

4. But the courts have held, that there is no limit to their discretion in this respect ; and that after two or more

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(1) Vide 2 Atk. 378. 3 Ibid, 542. (2) 2 W. Blacks. 963.

(3) Vide 2 W. Blacks. 802. Ibid. 920. 2 P. Wms. 563. 2 Atk. 378.

trials, whether concurring or contradictory, they will grant another, and *toties quoties*, so long as any settled rule of law is violated, or justice defeated, by the finding of the jury.

*Colles*, in his "Parliamentary Cases," reports instances of a third and fourth trial, awarded by the house of lords.(1) And in *Clarke v. Udall*, several cases were cited, which the chief justice allowed, that where upon the second trial the jury have doubled the damages, a third trial had been granted.(2)

So, in *Goodwin v. Gibbons*.(3) The defendant was an attorney. At the first trial, the jury found that he had acted beyond his office and authority, or his duty as an attorney, and gave a verdict for the plaintiff, which verdict was set aside, and a new trial granted. The second verdict was also found for the plaintiff, which second verdict was now prayed to be set aside also; and a third new trial was prayed. A rule was made upon the plaintiff to show cause. Lord *Mansfield* said, there was no ground to say that a new trial should not be granted, after a former new trial had been once granted before. There was an index to a report book,(4) which had mistaken a decisive particular reason, in a particular case, for a general rule. But there was no such general rule as had been supposed. A new trial must depend upon answering the ends of justice. However, in the present case, he did not see any reason for a new trial. He observed, that there is no question of right, nor any great value; and upon the whole, he was clear that no new trial ought to be granted. Mr. Justice *Yates*, was clear that a second new trial might be granted, as well as a first, if the reasons for granting it were suffi-

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(1) Vide *Colles*, 310—318.

(2) 2 Salk. 649.

(3) 4 Burr. 2108.

(4) Vide 6 Mod. Index, "Trial."

cient. But he also thought in the present case there was no sufficient reasons for granting one.”(1)

*Fox v. Clifton.*(2) Assumpsit for work and labour, and materials found, against the defendant Clifton, and others, as partners, forming a distillery company. The weight of evidence was against the fact that the defendants were co-partners at the time of the contract with the plaintiff. The jury were charged to this effect, but found, notwithstanding, a verdict for the plaintiff. The defendants applied for, and obtained a new trial.(3) Upon submitting the case to the jury a second time, the evidence varied but little from that on the former trial, and the judge charged that the facts proved did not constitute the defendants partners. The jury, however, again found for the plaintiff. A rule nisi was obtained, on the ground that the verdict was against evidence, and that illegal testimony had been admitted. *Tindal*, Ch. J.—“ This cause has come before the court upon a second application for a new trial ; and if the questions before the jury had been merely questions of fact, we should probably have hesitated much, after two concurrent verdicts for the plaintiff, before we should have sent the cause down to a third investigation. For although no precise rule can be laid down upon this point, but each case must stand upon its own proper ground, yet it would be only under very strong and well grounded dissatisfaction with the former verdicts, that the court could be induced so far to interfere with the proper province of the jury, on questions which the law has placed under their peculiar jurisdiction, as to send a mere question of fact to trial by a third jury, where two have before pronounced the same opinion upon it. But the questions in this case submitted to the jury, were not questions of mere fact, but questions

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(1) Et vide 1 Term Rep. 167.

(2) 9 Bingham, 115.

(3) Vide 6 Bingham, 776.

in which the law and the fact were so intimately involved and combined together, that the jury cannot be said to have come to a right conclusion upon the fact, unless they are contented to take the law upon the subject from the judge, who presided at the trial." His lordship, after commenting at large on the points submitted to the jury, concludes:—"We think the finding upon each of these questions has been a finding upon the legal result of the facts proved, and upon this ground we think the rule for a new trial should be made absolute."

In *Silva v. Low*,<sup>(1)</sup> Action on a policy of insurance. The sum insured was \$5,500, and the loss was averred to have happened by the perils of the sea. The judge submitted two questions to the jury; whether the vessel was seaworthy, and he expressed his opinion, that the weight of evidence was in favour of her seaworthiness; and whether the voyage on which she sailed was different to the one described in the policy; with directions, that if the vessel was unseaworthy, or the voyage was different from that described in the policy, they should find for the defendant, otherwise their verdict should be for the plaintiff. The jury found for the plaintiff, with damages as for a total loss. On the following term, a motion was made for a new trial, on the ground that the verdict was against evidence; and after argument, a new trial was granted.<sup>(2)</sup> Upon this trial, also, the jury found for the plaintiff as before; and, on motion for a third trial, the court directed it, on the ground that the jury had manifestly disregarded the determination of the court, on the question of law settled on a previous argument.<sup>(3)</sup>

In *Wilkie v. Roosevelt*,<sup>(4)</sup> the rule is well illustrated.

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(1) 1 Johns. Cas. 184. Supra, p. 334.

(2) 1 Johns. Cas. 205.

(3) Vide Ibid. S. C. 336.

(4) 3 Johns. Cas. 206.

On a second trial of this cause,(1) on a question of usury, the jury again found a verdict for the plaintiff. A motion was now made to set aside the verdict, and for a new trial, on a case containing substantially the same facts as appeared in the former case. The verdicts in both motions were contrary to the charge of the judge and the law of the case. The second point made was, whether the court could again interfere, there having been two concurring verdicts. The judges delivered their opinions severally. *Thompson, J.*—“The granting of new trials is matter of sound discretion in the court, under all the circumstances of the case. It is undoubtedly for the furtherance of justice, that the powers of the court, and the powers of the jury, should be confined within their proper limits. That the jury should be the triers of the fact, and the court judges of the law. And although, after two verdicts, the court will proceed with the utmost caution and deliberation in granting another trial, yet when the verdict is against law, there can be no question as to the right of this court again to interfere; and I think there can be but little doubt as to the duty of the court to exercise that right. I do not consider this as one of those cases where the rigorous execution of extreme legal justice is hardly reconcileable to conscience, and that on that ground the court ought not again to grant a new trial. If the statute against usury is an unconscientious defence, or the law impolitic, it is the province of the legislature to repeal it. But, as long as it remains in force, it is the indispensable duty of a court and jury to carry it into effect; and from an attentive examination of all the circumstances of this case, I cannot discover any plausible grounds the jury could have taken in giving their verdict, consistent with the law arising from the facts. Considering, therefore, the verdict as both against law and

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(1) Vide 3 Johns. Cas. 66.

evidence, I am of opinion that a new trial ought to be granted." Of this opinion were three of the judges ; *Lewis*, J. and *Livingston*, J. dissenting. And a new trial was granted.(1)

So, in *Lessee of Burkart v. Bucher*.(2) This was an appeal from the decision of Mr. Justice Smith. The cause was tried twice ; first, before the chief justice, when a verdict was found for the defendants, contrary to his charge, and a new trial was ordered ; and a second time before Judge Smith, in which the jury found again for the defendants, and a new trial being refused, the plaintiff appealed from the decision. One of the points was, that the verdict was occasioned by misdirection, which was met by urging the hardship of the case. *Tilghman*, Ch. J., with whom the other judges concurred in granting the motion. — "Against a new trial, it is urged that this is a hard case, in which there have been two verdicts for the defendants. I perceive that it is a hard case, and I am extremely sorry for it. It is always hard on a man who has the misfortune to purchase a bad title. But I must not suffer my feelings for the defendant to carry me so far, as to do injustice to the plaintiff. If the cause had gone to the jury in the manner which I conceive it ought, by law, to have been submitted to them, I should have been against a new trial. It must be a very extraordinary case indeed, in which I could be induced to give my opinion for a new trial, after two verdicts on matters of fact ; but that is not the present case. I can have no assurance that the jury would have found the same verdict, under a different direction, as to the point of law which has been mentioned. I must, therefore, with reluctance, give my opinion, that this court cannot, without injustice, refuse the plaintiff a new trial."(3)

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(1) Et vide 1 Term Rep. 170.

(2) 2 Binn. 455.

(3) Vide 2 Hayw. 224.

Upon the same principle, the same court, in *Keble v. Arthurs*,<sup>(1)</sup> directed a new trial, after two concurring verdicts. In both instances there had been a verdict for the defendant, but clearly against the evidence, and impressing a strong conviction on the mind of the court, of great injustice to the plaintiff. After a brief review of the case, *Tilghman*, Ch. J., concludes—"I should wish that the cause might be reconsidered, under this aspect, for I am very strongly of opinion that the plaintiff has been injured. From the present arrangement of the courts, it is not probable that this matter will ever again come under our consideration. I make no doubt that justice will ultimately prevail, and my conscience is well satisfied by consigning the cause, for another trial, to the impartial tribunal appointed to take cognizance of it." New trial granted.

And in *The Commissioners of Berks County v. Ross*,<sup>(2)</sup> The court laid down the rule broadly, "That there is no rule of law against granting a new trial after two concurring verdicts, nor will the court hesitate to do it, if the verdicts are against law."<sup>(3)</sup>

In *Ruffners v. Barrett*,<sup>(4)</sup> One Daniel Ruffner sued Barrett, on a bond. The defence was, that Barrett had executed the bond to Joseph Ruffner and Samuel Henry, executors, who had assigned it to the plaintiff, and that it was paid to Henry, without notice of the assignment. The jury found for the plaintiff below. The defendant filed a bill, and prayed a perpetual injunction of the judgment at law. The chancellor directed an issue, which was found for Barrett, and, upon motion, granted a new trial, which was found against Barrett. The court certified the verdict, and with it all the evidence given before the jury; from which it clearly appeared that Barrett, before he paid

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(1) 3 Binn. 26.

(2) 3 Binn. 520.

(3) Et vide *Mitchell v. Mitchell*, 4 Binn. 180.

(4) 6 Munf. 207.

the money to Henry, had full notice of the assignment of the bond to Daniel Ruffner. The chancellor perpetuated the injunction, and Ruffner appealed; and by the court of appeal the decree was reversed, the injunction dissolved, and the bill dismissed with costs.

So, *Payne v. Trezevant*.<sup>(1)</sup> Upon a motion to set aside a verdict, and grant a new trial, on the grounds that the finding of the jury was against law, evidence, and the opinion of the judge, before whom the cause was tried. The action was on two promissory notes, and the defence was usury. The judge, in charging the jury, told them they were bound by the act of the legislature, enacted by the supreme authority of the state; and if a jury was justifiable in disregarding any one act, they might refuse to be bound by any other act or law which did not accord with their own opinions; and thus the fixed and stable principles of law would, in future, be obliged to give way to the fluctuating and uncertain opinions of juries. That the act in question made all usurious contracts void; and that the evidence in this case, brought the usurious transaction between the original parties, borrower and lender, so immediately and directly under the act, that it was impossible for them to wink so hard as not to see it. Yet the jury found for the plaintiff. The court, in disposing of the motion, observed, that the jury had found against the clear and positive testimony, as well as against a public law of the state, and the clear opinion of the judge, who tried the case, upon all the points, as reported by him to the court. That it was the duty of the court, whenever the juries of the country will take upon them to disregard the laws of the land, and clear and indubitable testimony, to set aside their verdicts *toties quoties*, until they can get twelve men firm enough to defend and support the legal

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(1) 2 Bay, 23.



institutions ; otherwise, the fluctuating sentiments of juries, would prevail against the stable principles of law.

This court had decided in a previous case, *Moore v. Cherry*,<sup>(1)</sup> where there had been two concurring verdicts, that whenever the principles of law are outraged by verdicts, another trial ought to be granted, "so as to give the party a chance for justice."

So the court will set aside a second verdict, if there have been any undue means resorted to, to obtain it. Thus, in an *Anonymous case*.<sup>(2)</sup> Per *Holt*, Chief Justice.—"After a second verdict on the same side, it is not fit to grant a new trial, because the judge did not like the verdict ; but if there were any practice used in obtaining it, it is otherwise."

This is one of the consequences of fraud, embraced in the rule, so universal as to have become a legal maxim, "Fraud will vitiate every thing."

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(1) 1 Bay, 269.

(2) 6 Mod. 22.

## CHAPTER XVI.

### IN EQUITY, AFTER VERDICTS ON FEIGNED ISSUES AND ISSUES AT LAW.

BEFORE new trials at law became the settled practice of courts of law, suitors were driven into equity for relief from unjust verdicts ; and to direct new trials at law, on account of fraud or surprise, under pain of perpetual injunction, formed an extensive branch of equity jurisdiction.(1) Since the introduction of new trials, and the facilities afforded by courts of law to correct improper verdicts, applications to courts of equity are much less frequent, or rather, are become obsolete.(2) The jurisdiction, however, remains ; and, for the same causes, surprise and fraud, the parties may still resort for relief to equity.(3) This, it appears, they may do, even after they have unsuccessfully applied to the courts of law ; but not upon the same merits as there discussed, if within their jurisdiction.(4)

But, besides this power to correct oppressive and illegal verdicts at law, courts of equity have a class of cases originating in equity jurisdiction, and directly and exclusively under their own control, called " Feigned Issues." These courts have, by their constitution, the right to dispose of all cases upon the pleadings and proofs, without the intervention of a jury ; but it is usual, in matters of intricacy and

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(1) 1 Burr. 390.

(2) Vide 6 Johns. C. R. 479, and the cases there cited.

(3) 1 Johns. C. R. 91.

(4) Ibid.

importance, especially those involving questions of fraud, to direct an issue at law, to be tried by a jury, to inform the conscience of the court. The granting or refusing a new trial, on a feigned issue, is wholly a matter of discretion. It is never done when the proof is clear on the one side or the other, nor when, in any event, the verdict could be but of little value.(1)

The practice is thus laid down by Sir William Blackstone.(2)—“The chancellor’s decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial, by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by a jury; especially such important facts as the validity of a will, or whether A. is the heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king’s bench, or at the assizes, upon a feigned issue. For, in order to bring it there, and have the point in dispute, and that only, put in issue, an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of £5 with the defendant, that A. was heir at law to B., and then avers that he is so, and therefore demands the £5. The defendant admits the feigned wager, but avers that A. is not the heir at law to B.; and thereupon that issue is joined, which is directed out of chancery to be tried, and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans, and are also frequently used in courts of law, by consent of the parties, to determine some

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(1) 1 Johns. C. R. 459.

(2) 3 Blacks. Com. 452.

disputed rights, without the formality of pleading, and thereby to save much time and expense in the decision of a cause."

In two instances only, by the English practice, that of an heir and of a rector, it is a matter of right to have an issue directed.(1) With us feigned issues are provided by statute, upon an appeal from the decision of the surrogate to a circuit judge, on probate of a will, and a reversal by the latter, founded upon a question of fact;(2) and also upon issue, taken by answer, to a bill of divorce, on the ground of adultery.(3)

It is also expressly enacted, that all issues upon the legality of a marriage, (except where a marriage is sought to be annulled, on the ground of the physical incapacity of one of the parties,) shall be tried by a jury of the country; and the chancellor shall award a feigned issue for the trial thereof.(4)

These issues, being thus particularly under the direction of the court, are moulded to the purposes of equity. To accomplish this, it is necessary the court should, in some instances, proceed upon rules incident to its own peculiar jurisdiction. Although courts of equity and law equally aim at the same result, and equally respect the finding of questions by a jury, of which, when referred to them, they are the constitutional judges, when bottomed upon a full disclosure of the merits; yet when there has been a partial or unjust result, occasioned by circumstances which the injured party could neither prevent nor control, or when important rights are depending, a court of equity will interpose, on grounds, and for reasons, differing from a court of law. These general remarks may be embodied and illustrated thus.

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(1) 2 Mad. Chan. 364.

(2) 2 R. S. 66, and 609.

(3) 2 R. S. 145.

(4) 2 R. S. 175.

1. Applications to a court of equity, to set aside verdicts at law, or open cases, will be denied, when the party applying fails or omits to present a case of diligence : a rule which will equally apply to feigned issues.

Thus in *Curtis v. Smalridge*.<sup>(1)</sup> The defendant's wife had pawned her husband's plate to the plaintiff for £110, for which the defendant, in trover, had recovered £115 damages against the plaintiff, and judgment accordingly. The plaintiff exhibited his bill to be relieved against the judgment, and to have a new trial, suggesting that the defendant was privy to the pawning, and received the £110: and the proofs being read, it appeared that the defendant had confessed so much : which, had it been proved at the trial, it was agreed the defendant could not have recovered. But there being no proof now, that the plaintiff at law could not, by reason of any accident, have his witnesses at the trial, the court would not, on any neglect of his, grant a new trial.

It will be denied, if the party has gone to trial at law without due preparation on the merits ; or if he have neglected to apply for a discovery, when deemed necessary, and to obtain a stay in the mean time. Thus,

In *Baronne v. Brent*.<sup>(2)</sup> The bill was to have an account, setting forth that the plaintiff had bought several goods of the defendant, and had paid him several sums of money in part satisfaction ; but the plaintiff having lost the receipts and acquittances, the defendant had recovered the whole value of the goods at law. The defendant demurred to the bill, because it appeared of the plaintiff's own showing, that the defendant had recovered at law. For the plaintiff, it was insisted, that if the case upon the bill was true, which by the demurrer was admitted, the plaintiff ought to be relieved in equity, as to the money overpaid.

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(1) 1 Chan. Ca. 23. Vide Eq. Cas. Ab. 377. 2 Freeman, 178.

(2) 1 Vern. Cas. 176.

And per *Lord Keeper*.—"If a man pays money in part of satisfaction, and afterwards the whole value of the goods is recovered against him at law, the money so paid upon that account, becomes money received for the use of him that paid it, and he may recover it in an action at law. But it was answered by the plaintiff's counsel, that though that may be true, where the whole debt is recovered, yet it would not be so in this case, because here the jury had allowed some payments, and made some abatement of the full value, but had not allowed all the payments, because the now plaintiff could not produce his receipts, and now if they would bring an action at law for the money so overpaid, they could not make out what payments the jury allowed and what not." *Sed non allocatur*. It was then insisted by the plaintiff's counsel, that they were entitled to have a discovery in this court, in order to enable them to proceed at law, they having lost their receipts and acquittances. *Lord Keeper*.—"After a verdict at law, you come too late for that, and I see no reason why the defendant should be put to answer." And the demurrer was allowed.

So, if the object of the application be to discredit witnesses, as in *Woodworth v. Van Buskerk*.<sup>(1)</sup> The plaintiff went to a hearing before arbitrators, without objection, and willing to rely on the testimony of the principal witness for the defendants. They awarded against him, and he applied to this court for relief, on the ground of impeaching the witness. The *Chancellor*.—"It is a rule at law, on the subject of new trials, that a party going voluntarily to trial, goes at his peril; and he cannot have a new trial merely to give him an opportunity of impeaching the testimony of a witness of whom he was apprized beforehand, and of the very purpose for which he was to be called. He must, at least, show that he had since discovered testimony

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(1) 1 Johns. C. R. 432.

of which he had no knowledge before the trial.(1) There is no reason why an award should be set aside on the grounds stated, when a verdict cannot; and that this court would not relieve in such case, against a verdict, was fully considered in *Smith & Mead v. Lowry*.(2) The reason of the rule applies equally in each case, and the same mischiefs would follow from relaxing it. The power of awarding new trials at law, is exercised upon liberal and equitable grounds, and this consideration renders the rule, drawn from the practice of the courts of law, the more applicable. There is no chancery case, within my knowledge, that approaches to this."

And, in analogy to this, the application will be refused, if the only ground be to have an opportunity of offering cumulative testimony with a view to a rehearing, as in *Dunham v. Winans*.(3) An interested witness had been examined for the complainant, and his testimony rejected at the hearing, and a decree for the defendant. The complainant petitioned for a rehearing, for the purpose of releasing the witness. The *Chancellor*.—"This application is novel in its character, and dangerous in principle. The objection to the witness, on the ground of interest, was distinctly raised and argued by counsel at the hearing, and the decree was not made until nearly two months afterwards. Five months after the final decree, the complainant for the first time offers to release the witness, and asks to set aside the decree, and open the proofs in the cause, so that he may be re-examined. The object of this testimony is to support that of another witness for the complainant, and to contradict the positive answer of the defendant, and the evidence of a witness examined on his part, after a

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(1) 2 Johns. Cas. 318. 5 Johns. Rep. 248. 9 Johns. Rep. 77.  
1 Wils. 98. 2 Salk. 653. 2 Binn. 582, *in notis*.

(2) 1 Johns. C. R. 320.

(3) 2 Paige, 24.

decree in the cause. It must be a very special case which will justify the court in opening the proofs, even to establish a new fact which a party has neglected to prove through inadvertance; but a new trial, or re-hearing, is never granted to enable a party to obtain cumulative testimony, or to contradict the witness examined by the adverse party.”(1)

The same rule will apply to a motion grounded on the party's being *surprised* by certain evidence, and, therefore, not prepared to meet it. It must appear a clear case of surprise, divested of all suspicion, as in *Richards v. Symes*.(2) The fact to be tried in the cause was, whether one Richards gave a certain mortgage to the defendant in equity. Upon the trial, in order to discredit the evidence of one Bere, the most material witness for the defendant in equity, the plaintiff brought a person to swear, that this witness for the defendant was not in England at the time he swore to the fact. Several affidavits were read upon the motion, on the behalf of the defendant in equity, to prove that Bere was actually in England at the time he swore to the fact. It was insisted, therefore, by his counsel, that the credit of Bere being invalidated, weighed greatly with the jury, and was the principal reason that induced them to give the verdict for the plaintiff in equity. *Lord Chancellor*.—“This is an application for a new trial. The ground for the new trial is, that the defendant, in this court, was surprised with evidence he was not aware of, and so he was not prepared to answer it.” After noting and disposing of various objections, urged in opposition to the motion, his lordship proceeds:—“But, in the present case, there are no grounds for a new trial. The person who makes an affidavit, on behalf of the defendant in

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(1) Vide *supra*, “Newly Discovered Evidence,” 485—494.

(2) 2 Atk. 334.



equity. swears that he gave Richards notice a fortnight before the trial : that they would, on the other side, attempt to prove Bere abroad. which, though it was not so particular as to point out the very place where they would show him to be, yet was sufficient notice for Richards to prepare to encounter this evidence.—There is another reason that weighs with me, that the new trial is prayed on behalf of the plaintiff at law : and if it had been better made out, I should not have inclined to grant it, because it was in his power to have been nonsuited. For, if his counsel had been of opinion, that there was evidence that they were not apprized of, and too strong for them to encounter, they might have advised him to suffer a nonsuit, and then he might have come back to the court for new directions, who would have ordered another issue at law, notwithstanding the nonsuit. Upon the whole, there are no grounds for a new trial, and it would be of extreme dangerous consequence to grant it, merely upon a suggestion, that the party was not apprized of this evidence, and, therefore, was not prepared to give an answer.”(1)

So, in *Standen v. Edwards*.(2) Devise of an estate to be sold, and the produce with the personal, for all the legitimate children of —— Standen, living at the death of his wife. Standen, after cohabitation for seven years under one marriage, married again during the life of his first wife. There were children by both marriages. Upon an inquiry, directed by the lord chancellor, the master reported *Charles Standen*, who was a son by the first marriage, to be the only legitimate child. Upon an issue directed, *Charles Standen* to be plaintiff, he obtained a verdict. A motion was made for a new trial, on the ground that there was more evidence to impeach the first marriage than had been produced ; but no circumstances of fraud

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(1) Vide *supra*, “ Surprise,” 174—178. (2) 1 Ves. jun. 133.

or surprise were laid. *Lord Chancellor*.—"I had no doubt in my mind, that the second marriage was good, and the first bad; but, as it depended on circumstantial evidence, I thought it a proper case for the consideration of a jury. There was evidence on both sides. The non-production of any farther evidence did not proceed from the imposition or control of the court, but from the discretion or neglect of the parties themselves; and in that case, I cannot decide against the common rule of the court, not to grant a new trial, unless upon circumstances of fraud or surprise. It is wonderful, that in this case, no circumstances of that kind can be alleged. I wish that could be shown, for the justice of the case calls loudly for re-examination. Here is a whole family rendered illegitimate by a mere accident. —I can do nothing in it, for I cannot permit parties to keep back their evidence at the trial, in order to bring it forward afterwards, and to try it again with more advantage." (1)

The rule has been recognised and established, as the well settled practice of our own courts, by a series of decisions.

In *Barker v. Elkins*. (2) The defendants had commenced an action at law, and the plaintiff had suffered the cause to proceed to verdict without making a defence, and then applied to equity for an injunction to stay the proceedings at law, and have a new trial. On motion to dissolve the injunction. *The Chancellor*.—"The plaintiff should have made his defence at law, by way of payment or set-off, and he might perhaps have called for a discovery in aid of his defence at law. No reason is assigned why he did not call for a discovery, or prepare and defend himself in due season. He has not stated what were the obstacles to a defence at law. A defendant cannot come here for a new trial, when no special ground of fraud or sur-

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(1) Vide 2 Ves. sen. 552. 579.

(2) 1 Johns. C. R. 465.

prise is suggested, and when he neglects, or omits due diligence, and without due excuse, to defend himself, in his proper place. This is a fundamental doctrine in this court. The principle has been so often declared, that it is useless to enlarge; and without resting on minor objections, the injunction cannot be retained on the merits of the case.”(1)

So, in *Dodge v. Strong*,(2) where the party lost his opportunity of defence by his own negligence, rule for a new trial having been granted by the supreme court, on conditions which the party failed to perform, within the time prescribed by the rule, the court refused its aid, it not appearing that the failure arose from the act of the opposite party, or from unavoidable necessity. *The Chancellor*.—“This is a motion to dissolve the injunction, staying execution at law, upon the coming in of the answer. The object of the bill was to obtain a new trial at law. The defence of the present plaintiffs, if any they have, was legal and available at law, and if this court could grant relief, it would be by requiring the present defendant to submit to a new trial. But it appears to me, after a very careful consideration of the case, as disclosed by the bill and answer, that I cannot retain the injunction consistently with the established doctrines of this court. The plaintiffs, by their own negligence, or that of their attorney, suffered an inquest to be taken against them, by default. They applied to the supreme court for relief, and relief was granted upon certain conditions, and those conditions were not fulfilled. This court has frequently declared, that relief cannot be had

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(1) Et vide *M<sup>r</sup> Vickar v. Wolcott*, 4 Johns. Rep. 510. *Lansing v. Eddy*, 1 Johns. C. R. 49. *Smith v. Lowry*, 1 Johns. C. R. 320. *De Lima v. Glassell*, 4 Hen. & Munf. 369. *Turpin v. Thomas*, 2 Hen. & Munf. 139.

(2) 2 Johns. C. R. 228.

here for the purpose of a new trial at law, when the party has lost his opportunity at law, by his own negligence. I need only to refer to the cases of *Lansing v. Eddy*,<sup>(1)</sup> *Simpson v. Hart*,<sup>(2)</sup> *Smith v. Lowry*,<sup>(3)</sup> and *Barker v. Elkins*,<sup>(4)</sup> as containing not only all the English authorities which I have met with on the subject, but a full exposition of the principles, on which the interference of this court is, in such cases, denied. I am not at liberty to depart from a rule so fully established."

And in *Foster v. Wood*,<sup>(5)</sup> it was held, the court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant, in the judgment, was ignorant of the fact in question pending the suit, or it could not be received as a defence at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of the defence. As, where a defendant paid part of a judgment recovered against him, and the plaintiff in that judgment, afterwards, brought an action of debt on the judgment, in which F. became special bail, and recovered a second judgment, for the whole of the original debt and costs, against the defendant, who neglected to prove the payment, which was omitted to be credited by the plaintiff, who afterwards sued F., the special bail, and recovered judgment against him for the whole debt, damages and costs, by default, F. being ignorant of the payment made by the principal on the first judgment.

So, also, in *Floyd v. Jayne*.<sup>(6)</sup> Although a strong equity was presented, the bill was dismissed, on the ground of negligence. *The Chancellor*.—"This is a bill for a new trial, after a verdict. The ground of the application is,

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(1) 1 Johns. C. R. 49.

(2) *Ibid.* 91.

(3) *Ibid.* 320.

(4) *Ibid.* 465.

(5) 6 Johns. C. R. 87.

(6) *Ibid.* 479.

the discovery, since the verdict, of testimony to prove the payment of the note, and the want of power in that court to grant a new trial, otherwise than for irregularity, as none of the judges are of the degree of counsellor in the supreme court. Anciently, courts of equity exercised a familiar jurisdiction over trials at law, and compelled the successful party to submit to a new trial, or to be perpetually enjoined from proceeding on his verdict. This relief was not granted, unless the application was founded upon some clear case of fraud or injustice, or upon newly discovered evidence, which could not possibly have been made use of upon the first trial. But this practice has long since gone out of use, and such a jurisdiction is rarely exercised in modern times, because courts of law are now in the constant and liberal exercise of the power of granting new trials. The present case, however, seems to form an exception to the modern rule, and to require of this court the exercise of that ancient jurisdiction, because here is a case in which the court of law has no power to award a new trial upon the merits. If the particular circumstances stated in the pleadings and proofs, rendered the exercise of the power proper, by a court of law possessing jurisdiction for that purpose, I should feel myself called upon to grant relief to the plaintiff, unless it should appear that the sum in controversy was too small to bear the expense of the remedy. But on examining the testimony taken in chief, I think it is pretty evident that the plaintiff did not use the requisite diligence, or the means in his power, to establish on the trial at law the payment which he now sets up as his defence; and for that reason he is not entitled to the interposition of the court, on the ground of the newly discovered testimony.”(1)

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(1) *Et vide Noland v. Cromwell*, 4 Munf. 155, and cases there cited.

And the same consequences will follow, if the party apply to a court of law in the first instance, having competent jurisdiction, and the application be denied ; it is considered *res judicata* in equity, if the grounds of the application in the latter court be the same. As in *Simpson v. Hart*.<sup>(1)</sup> The action had been brought by the now defendant, in the mayor's court, where the now plaintiff had offered a judgment against the defendant and his father, by way of offset against the judgment of the defendant which had been overruled. The plaintiff filed his bill for relief in this court, and obtained an injunction, which the present motion was intended to dissolve. The plaintiff put no additional grounds before the court. After recapitulating the facts, the *Chancellor* proceeds :—" We have then here the same question, resting on the same principles, as the one considered and decided in the mayor's court ; and it is certain that the mayor's court had competent jurisdiction over it.—This case is one of the strongest, against the interference of this court, that could well be presented, for the party is not seeking relief against any laches, or mistake, or fraud ; but he is seeking for a review of his case, after failing in a voluntary application to the equitable powers of the mayor's court, on the very point now submitted, and after that application had been received, heard, and denied.—The principle that a matter once considered and decided by a competent power, shall not be reviewed by any other tribunal having concurrent power, except in the regular course of error or appeal, does not rest upon the mere technical form of the decision. That would be too narrow a ground ; decisions in the case of new trials do not appear upon record, and they are also decisions resting in sound discretion. It is the unfitness and vexation, and indecorum, of permitting a party to go

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(1) 1 Johns. C. R. 91.

on successively by way of experiment, from one concurrent tribunal to another, and thus to introduce conflicting decisions, that prevents the second inquiry; and it ought to be observed, as an answer to much of what was said against the incompetency of the courts of common pleas over such questions, that if this mode of review was to prevail, it would apply as well to the case of an unsuccessful application to the supreme court, as to any of the courts below it.”(1)

So, in *Kemp v. Mackrell*,(2) it was held that parties, resting their defence in an issue at law, upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence, or to say the forged instruments were immaterial. On exceptions to the master's report for allowing several notes to be brought into the account by the plaintiffs, assignees of Cardwell a bankrupt, several issues were directed to try the validity of those notes, which were all found to have been forged, and the application was now for relief, on the ground that the notes were not material. *Lord Chancellor*—“Whether this is the case of assignees under a commission, or of a person suing in his own right, I must go by the same rule. When issues are directed, either on hearing of the cause, or on exceptions upon facts of this kind, it is afterwards taken to be decisive, as to the fact directed to be tried, and as to the consequence of that fact, unless it is a distinct consideration, as where there was a double consideration, whether the deed was forged or not, and the consideration of equitable circumstances. It is now said, that whether these exhibits are true or false, there is other evidence which makes them immaterial. If the court should now go into

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(1) Vide *Bromley v. Holland*, 5 Ves. 610. *Vaulx v. Shelley*, Rep. Temp. Finch, 472. *Williams v. Lee*, 3 Atk. 223.

(2) 2 Ves. sen. 579.

that other evidence, there would never be an end of things; therefore, for the sake of precedent, I will not do what is now desired by the plaintiffs. 'The parties must abide by the defence they set up; and if they set up a forged defence, they must rest upon it, and cannot afterwards say that piece of evidence is nothing to the purpose.'(1)

Nor will courts of equity interpose, for the relief of parties against verdicts and judgments at law, when the court has had competent jurisdiction, although they may be dissatisfied with the result. 'Thus, in *Bateman v. Willoe*,(2) cited above, where it was held, that a verdict obtained against a defendant, who neglects to apply for a new trial within the time appointed by the rules of the court at law, a court of equity would not entertain a bill for an injunction, on the ground that the plaintiff's demand was unconscientious, or that it was fit subject-matter for an account, provided it was competent to the party to lay those grounds before the jury on the trial, or before the court of law, on motion for a new trial. And in that case the bill was dismissed.(3)

So, if the defendant below neglect to bring his bill for discovery, in aid of his defence at law, as in *Williams v. Lee*.(4) A bill was filed, in order to set aside a verdict and judgment at law, as obtained against conscience. The defendant in equity pleaded the verdict, and judgment at law in bar. And, per Lord *Hardwicke*.—"As to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact, of his own knowledge, to be otherwise than what the jury find by their ver-

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(1) Et vide *Overton v. Ross*, 2 Hen. & Munf. 408.

(2) 1 Sch. & Lefroy, 201. Supra, p. 188.

(3) Vide *Parsons v. Lanoe*, 1 Ves. sen. 192. *Colgrave v. Juson*, 3 Atk. 197.

(4) 3 Atk. 223.



dict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for debt, and the defendant, after the verdict, discovers a receipt for the very demand in the action; here the court would relieve. But, even in these cases, they will not always relieve against a verdict, where the defendant submits to try it at law first, when he might, by a bill of discovery, have come at this fact by the plaintiff's answer upon oath, before any trial at law was had."(1)

So, also, in *The Marine Insurance Company v. Hodgson*.(2) This suit was brought in the circuit court, sitting in chancery, to obtain a perpetual injunction to a judgment rendered at law, in favour of the defendant in equity, and, as the complainants alleged, most unjustly. *Marshall, Ch. J.*—"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may, with equal safety, be laid down as a general rule, that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court, that the defence ought to have been sustained at law.—It will not

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(1) As to equity's not interfering when the merits have been disposed of at law, vide *Pym v. Blackburn*, 3 Ves. jr. 34. *Holtzapfel v. Baker*, 18 Ves. 115. *Hare v. Groves*, 3 Anst. 687. *Bullock v. Dommitt*, 2 Chitty's Rep. 608. *Pollard v. Shaaffer*, 1 Dal. 210. *Phillips v. Stevens*, 16 Mass. Rep. 238.

(2) 7 Cranch, 332.

be said, that a court of chancery cannot interpose in any such case. Being capable of imposing its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law.”(1)

2. But when the plaintiff in equity makes a clear case of fraud and surprise, or subsequent discovery of evidence, or of any cause affecting the merits of which it was not possible he could have availed himself at the trial below, the court has granted a new trial.

As in *Hennell v. Kelland*.(2) An action was brought against an administrator, who pleaded *plene administravit*, and the trial was brought down by proviso; and at the trial, the defendant being put to prove a sum of £50, paid before the plaintiff's original writ, which, not being provided to do, a verdict was against him. Yet, after finding the note, whereby his witness was enabled to swear that matter, on a bill brought in chancery, a new trial was granted.

So, in *Coddrington v. Webb*.(3) Bill for a new trial, suggesting the plaintiff's mark to the bond was forged by one Webb; and by surprise, defendant had recovered against him at law, all the pretended witnesses to the bond being dead. New trial ordered. *Tewke's case*, and *Swinfield's case*, cited.

And in *Tilly v. Wharton*.(4) Wharton, on a plea of *non est factum*, had obtained a verdict on a bond of £3000 penalty for payment of £1500, and, there not being sufficient personal assets, Wharton brought a bill to have a

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(1) Ante *Meredith v. Johns*, 1 Hen. & Munf. 585. *Maupin v. Whiting*, 1 Call. 224. *Terrell v. Dick*, 546.

(2) 1 Eq. Ab. 377. (3) 2 Vern. 240. (4) 2 Vern. 378.

trust of lands executed, in aid of the personal estate. The defendant insisted the bond was forged, and had made a strong proof of it; but that being the point tried at law, the court would not enter into the proof thereof, or permit the depositions to be read; but admitted, if the witnesses had been convicted of perjury, or the party of forgery, that might have been a just ground for relief in equity, especially since the prosecuting of attainments was become, in a manner, impracticable. But upon an appeal to the house of peers, a new trial was directed, and the bond found to be forged.

And, in some instances, equity will relieve after a verdict at law, and when the plaintiff in equity might properly have defended himself.

As in *The Countess of Gainsborough v. Gifford*.<sup>(1)</sup> The defendant had brought his action on a contract to deliver stock, and recovered a verdict. The plaintiff brought her bill to be relieved against the contract which her broker had made for the purchase, without her authority, and obtained an injunction, after she had brought a writ of error on the judgment at law. *Master of the Rolls*.—"I do agree the court ought to be very tender how they help any defendant after a trial at law, in a matter where such defendant had an opportunity to defend himself. But still such cases there are, in which equity will relieve after a verdict, in a matter where the defendant at law might properly have defended himself. As if the plaintiff at law recovers a debt against the defendant, and the defendant afterwards finds a receipt, under the plaintiff's own hand, for the very money in question. Here the plaintiff recovered a verdict against conscience; and though the receipt were in the defendant's own custody, yet he, not being then apprized of it, seems

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(1) 2 P. Wms. 424.

entitled to the aid of equity, it being against conscience, that the plaintiff should be twice paid the same debt. So if the plaintiff's own book appeared to be crossed, and the money paid before the action brought. Now the principal case is within the same reason."<sup>(1)</sup>

So in a case of fraud, *Roy v. The Duke of Beaufort*.<sup>(2)</sup> The bill was for relief against a judgment on a bond, in which the plaintiff was jointly bound with his son, in the penalty of £100, that the son should not commit any trespass in the Duke of Beaufort's royalty, by shooting, hunting, fishing, &c., except with the license of the gamekeeper, or in the company of some qualified person. The son having caught two flounders with an angling rod, the bond was put in suit, and judgment for the penalty. It appeared that the gamekeeper's brother-in-law, and another servant of the duke, had asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict was found merely on their evidence. Lord *Hardwicke* decreed the plaintiff should be relieved against the verdict, and that the duke should refund the £100 recovered on the bond, and the £40 damages, upon the ground of a fraud practised upon the son to work a forfeiture of the bond.

And similar relief has been granted in a case of great value, and settling an important principle, as in *Edwin v. Thomas*.<sup>(3)</sup> The issue directed to be tried touching the custom of the manor of —, was found against the plaintiff, Edwin; and the cause being now set down upon the equity reserved, it being alleged to be a cause of value, and concerning all the copyholds in the manor, a new trial was directed upon payment of costs.

So, where the inheritance is to be absolutely bound on a

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(1) Vide *Ashe v. Ashe*, 1 Brown's P. C. 561. *Pomfret v. Smith*, 6 Ibid. 434.

(2) 2 Atk. 190.

(3) 2 Vern. 75.

question of heirship, as in *Baker v. Hart*.<sup>(1)</sup> The cause was heard before the lord chancellor, and issues were then directed; it came on now upon the equity reserved, and upon an application for a new trial. *Lord Chancellor*—"Upon the second issue before lord chief justice *Willes*, the jury found that William Baker, the father of the plaintiff, was not the heir of Admiral Hosier. But it has been certified to me by the chief justice, that the finding of the jury depended upon the verdict given on the first issue. The application now is, not to set aside the verdict, but for another trial. Where it is a matter of inheritance, the court, without setting aside the first verdict, for the more solemn determination in some cases, direct a second trial; and if the court direct such trial without setting aside the former verdict, then the first may be given in evidence, and will have its weight with the jury.—In many cases where it is a matter of inheritance, and not actually conclusive, the court have not directed a new trial; but where the inheritance will be absolutely bound, the court has granted a new trial. In the present case, it is insisted the inheritance will be bound, and said in answer to that, the plaintiff may try it over again in ejectment. If so, where is the prejudice to the defendant, if the court should direct it to be tried again?"<sup>(2)</sup> And new trial ordered.

In *Stace v. Mabbot*,<sup>(3)</sup> where a new trial was granted on the ground of importance and of newly discovered evidence, the principles, in general, on which courts of equity will interfere, especially in cases where fraud would otherwise triumph with impunity, were fully stated, and the distinction between the acts regulating applications of this

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(1) 3 Atk. 542.

(2) Vide *Earl of Darlington v. Bowes*, 1 Eden, 270. *Baker v. Hart*, 1 Ves. sen. 28.

(3) 2 Ves. sen. 552.

kind at law and in equity definitely ascertained. A motion was made for a new trial. The question was as to the forgery of a certain paper, relative to the estate of *Captain Girlington*. Against this, it was said, *Justice Foster*, who tried the issues, had certified that he was satisfied with the verdict, and two cases were cited, and relied on, in which courts of law had refused a similar motion. *The Lord Chancellor*, after a brief notice of the rules governing applications for new trials at law, proceeds—"But this court directs issues to be tried at law, to inform the conscience of the court, as to facts doubtful before, and therefore expects in return such a verdict, and on such a case as shall satisfy the conscience of the court to found a decree upon. If, therefore, upon any material and weighty reason, the verdict is not such as to satisfy the court to found a decree upon, there are several cases in which this court has directed a new trial, for further satisfaction, notwithstanding it would not be granted if in a court of common law, because it is *diverso intuitu*, and because the court proceeds on different grounds. This is known to be the ordinary rule of this court, where a matter of inheritance is in question, for the court says an inheritance is not to be bound by one verdict, if any sort of objection arises to the trial; and that notwithstanding the objection of inconvenience in examining over and over, which objection has not prevailed. This extends also to a personal demand, where of considerable value, and where the court is not satisfied with the grounds on which the determination was made at law, and when an objection is made and supported by proof; and particularly in a case of forgery, new trials have been granted, and that by judges who sat here, who have been as reluctant as any, and who inclined to adhere to the rules of common law. I remember a case in Lord *King's* time, relating to a rent charge. It had been twice or thrice tried at common law, tried upon distress taken on the rent charge and an avowry, and where the question was singly,

whether it was a forgery or not, and upon all those trials, verdict was found for the deed. A bill was notwithstanding brought here to set it aside for forgery ; and Lord King sent it to trial under an issue directed by the court ; and I believe there was a new trial after that ; and notwithstanding all those verdicts, Lord King made a decree to have it brought into court and cancelled here, the former trials not being to the satisfaction of the court.”(1)

A strong example of the interference of the court, in setting aside verdicts and judgments obtained by fraud, is presented in *Reigal v. Wood*,(2) where an attorney revived, by *scire facias*, an old outstanding judgment, on which but a very small sum, if any thing, was due ; and knowing that the land, on which the judgment remained a lien, was in the possession of innocent and *bona fide* purchasers ; and afterwards made use of the judgment to compel the purchasers, who were ignorant of the proceedings under the *scire facias*, to pay and secure to him a debt he claimed against the person under whom they had purchased. *The Chancellor*.—“ It appears to me, from a view of all the facts and circumstances attending this case, that I am bound to consider the judgment upon the *scire facias* as unduly obtained ; and that the defendant cannot, in justice and good conscience, be permitted to hold any advantage which he may have obtained under it. It is a well settled principle in this court, that relief is to be obtained, not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition.” After a review of the case, the chancellor, having satisfied himself that the weight of evidence was, that the whole of the original judgment, costs as well as debt, had

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(1) Vide *Edwin v. Thomas*, 2 Vern. 75. *Wardens of St. Paul v. Morris*, 9 Ves. 155. *Vaignear v. Kirke*, 2 Dessaus. Chan. Rep. 643, *in notis*.  
(2) 1 Johns. C. R. 402.

long before been satisfied, concludes—"I am of opinion, therefore, that Wood cannot be permitted to acquire and hold any advantage whatever, under the judgment obtained upon the *scire facias*, and that the whole proceeding was an imposition upon the plaintiffs. I shall accordingly, decree, that the bonds and mortgages mentioned in the pleadings be given up and cancelled, and that the money which has been paid upon one of the bonds and mortgages be refunded, with interest, and that the defendant, Wood, pay the costs of this suit."(1)

3. The object of issues, directed out of chancery, being to inform the conscience of the court if the verdict of the jury prove satisfactory, although the rules of strict law, in the admission or rejection of evidence, or directions to the jury, may not have been complied with, a new trial will be refused.(2)

We have seen in *Stace v. Mabbot*,(3) and in *Richards v. Symes*,(4) that the court proceeds to dispose of applications of this kind by a practice peculiar to equity. The controlling principle is, to satisfy the conscience of the court. In *Bootle v. Blundell*,(5) a bill was filed by devisees, praying that the will of *Henry Blundell* might be established against the heir at law. An issue, *devisavit vel non*, was directed. At the trial, the counsel for the plaintiffs examined one *Blanchard*, to prove the will and codicil, declining to call the other two subscribing witnesses; and after the examination of the surgeon and the physician, whose evidence was strong, as to the general capacity, with temporary stupor, the consequence of an attack

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(1) Vide *Barnesly v. Powel*, 1 Ves. sen. 120. *Richmond v. Tayleur*, 1 P. Wms. 734.

(2) 2 Tidd, 920. Gra. Prac. 415.

(3) 2 Ves. sen. 552. *Supra*, p. 576.

(4) 2 Atk. 319. *Supra*, p. 189.

(5) 19 Ves. 494.



of jaundice, the counsel for the defendant, who was present, with his consent, gave up the cause. The defendant moved for a new trial, complaining of the manner in which this issue, directed for the satisfaction of the court, was tried, without examining all the attesting witnesses. For the plaintiffs, it was contended, that the rule requiring the examination of all witnesses, was confined to the court of equity, and could not be applied to a trial at law, either by ejectment or in an issue. *The Lord Chancellor.*—"The rule of this court, requiring that, to establish a will of real estate, all the three witnesses shall be examined, is not, by any means, as it has been represented, a mere technical rule. If this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form, that it is regarded as conclusive, whether the judgment is obtained upon a verdict, or in any other shape; but, upon an issue directed, this court reserves to itself the review of all that passes at law; and one principle on which the motion for a new trial is made here, and not to the court of law, is, that this court regards the judge's report with a view to determine whether the information collected before the jury, together with that which appears upon the record in this court, is sufficient to enable it to proceed satisfactorily."

It appeared in this case, that there was much misapprehension of the law governing the evidence on the part of the judge who tried the feigned issue, yet the chancellor, after a review of the whole case, as reported by the judge, and the probable consequences of a new trial, concludes—"Therefore, though the rule is clear, that a will cannot be established, unless all the three witnesses are examined—upon which this court looks, not only to what passed at law, but also to what appears upon its own record, and therefore an inconsistency in not calling all the witnesses

at law ; and though they are the witnesses of this court, and not of either party, as they are erroneously considered, yet guarding this case as a precedent, I will not grant a new trial, the heir having judged for himself at the time of this trial.”(1)

So, in *Hampson v. Hampson*,(2) a motion was made for a new trial of an issue, directed to try whether a deed was obtained by duress or fraud. The ground of the motion was, that written evidence had been rejected by the judge, which ought to have been received. *The Chancellor* refused the application, declaring his opinion, upon a very minute consideration of all the evidence, that though the paper which was rejected ought to have been received, it ought not to have produced a different verdict. “Courts of equity,” observes his lordship, “have an original jurisdiction, which I agree must be exercised according to a sound discretion, to try questions of fact without the intervention of a jury, and which aid is sought, according to the common expression, for the purpose of informing the conscience of the court. I agree that a mistake, in refusing to send the cause to a jury, is a just ground of appeal, if the court of appeal should think that the contrary decision would have been a sounder exercise of discretion ; but it is a competent exercise of the authority and duty of the court, in every case, and throughout every case, and in every stage, to determine according to its discretion, whether it does, or not, want that assistance.”

So, if the judge who has tried an issue, directed by a court of equity, accompanies the verdict with his dissatisfaction but weakly expressed as to the question of fact, it is

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(1) Vide *Standen v. Edwards*, 1 Ves. jun. 133. *Bates v. Graves*, 2 Ves. jun. 287. *Bennett v. Taylor*, 9 Ves. 381. *Claiborne v. Parrish*, 2 Wash. Rep. 146.

(2) 3 Ves. & Bea. 41.

not a ground for granting a new trial, should the verdict notwithstanding be satisfactory to the court. *Atkins v. Drake*.<sup>(1)</sup> This was an issue directed by this court, in pursuance of an order of the house of lords, whether for time immemorial there had been payable, and of right ought to be paid to the vicar of the parish of Warenfield, in the county of York, "a modus." There was a decree for the defendant on a cross bill, praying an account and payment of tithes from which the complainants had appealed to the house of lords. The judgment of the house of lords was made a rule of this court, and the decree of the latter was varied by, *inter alia*, referring it to a trial at law, upon the issue mentioned to be tried in a feigned action. The jury found that the modus was payable at midsummer; that it had been immemorially paid, and that it covered all the lands in the township, and was not confined to the ancient crofts. The learned judge endorsed upon the postea an abstract of the proof, adding that he should have been better satisfied had the verdict confined the modus to the ancient crofts. *Parke* moved for a rule to show cause why a new trial should not be had on the grounds that the verdict was against the evidence, and against the opinion of the learned judge. The court granted the rule, and the learned judge's report having been received, and the case argued at great length, the barons delivered their opinions *seriatim*. *Alexander*, Ch. B.—"My opinion is, that there is no ground to disturb this verdict. It appears to me, that the jury have drawn a right conclusion from the evidence that was before them. I think it is the conclusion I should have drawn if I had been one of themselves. I do not undertake to say whether, if the opinion of the learned judge had *been strongly marked*, and this had been a legal question only, that might or might not

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(1) 1 M'Clelland & Younge, 213.

have been a reason for sending it back. But as this is an issue of fact, directed by this court, in which, what I have to consider is, whether the verdict is or is not satisfactory to me, and more especially as the judge has not expressed himself in that strong language, which would warrant a belief that he was extremely dissatisfied with the verdict, his opinion as stated on his notes, containing in effect only a negative pregnant on the subject—it does not appear to me that I should agree to send the question to be tried by another jury.” And, *Per totam Curiam*—the rule was discharged.(1)

In *Collins v. Hare*,(2) in the house of lords, the effect of a strong expression of the satisfaction of the judges on the result of feigned issues is put thus:—A master, in order to make a provision for a confidential clerk, after his own decease, insures his life for £3000, he paying two thirds of the premium, and the clerk one third, and assigns the policy to the clerk. The clerk has a liberal salary, independent of this bounty; the master dies, and in his will is found a letter, stating that the assignment had been procured from him by undue influence on the part of the clerk, and evidence of declarations by the clerk, that he had it in his power to ruin the credit of the house, by the manner in which he kept the accounts; held, that the assignment, as to two thirds of the policy for which the master had paid the premium, was fraudulent and void. The lord chancellor, in this case, had directed an issue whether there had been “fraud and undue influence,” and the jury found there had, and the chief justice, who tried the issue, expressed himself satisfied. Collins then applied to the court for a new trial, principally on the ground that his witnesses had not been examined; but the application

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(1) Et vide *Ringrose v. Todd*, 12 Price, 650.

(2) 1 Dow & Clark, 139. 2 Bli. N. S. 106.

was refused, and the lord chancellor finally decreed that the assignments, so far as related to two thirds of the policy, were fraudulent and void, and that £2000 were assets of the testator. John Atkinson. From this decree, Collins appealed. *Lord Chancellor*, after stating the case—"There is, in point of form, something objectionable in this verdict, because it is partly hypothetical; but the material point in the case was tried on the issue, and as the issue was directed for the purpose of informing the conscience of the equity judge, if the main object was gained it was sufficient. The judges, both at law and equity, were satisfied with the verdict, and therefore it must be a strong case indeed, that should induce your lordships to send the matter to a new trial, in opposition to the opinion of the late noble chancellor of Ireland, who had a much better opportunity of investigating the facts on which the case mainly depended, than your lordships have." And new trial refused.

So, in *Barker v. Ray and others*,<sup>(1)</sup> it was held, a new trial of an issue will not be granted, merely because, on the former trial, evidence was rejected which ought to have been received. Neither will a new trial be granted, merely because the judge made to the jury an inaccurate representation of the effect of the defendants' answers. Two issues were directed in this case; the first, as to the legitimacy of the plaintiff's father; the second, respecting the execution and validity of a will by the father. The jury found for the plaintiff on the first issue, and the defendants on the second. The plaintiff moved the chancellor for a new trial, and chiefly relied on the ground of legal evidence having been rejected. *Lord Chancellor*.—"In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say, that this

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(1) 2 Russell, 63.

court, in granting or refusing new trials, proceeds upon very different principles from *those of a court of law*. Issues are directed here to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed here; and looking at the depositions in the cause, and the proceedings, both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds.”(1)

To induce the court to disturb a verdict found on an issue, it must be either contrary to the evidence, or given under the misdirection of the judge, as to the principles of law.

In *Savage v. Carroll*,(2) an issue had been directed to inquire whether *Beauchamp Bagnall*, deceased, and *James Carroll*, deceased, entered into the following agreement; that said Bagnall should convey to the said Carroll the lands of *Ballynagrane*, in the pleadings mentioned, and that the said *Carroll* should pay for the same, at the rate of twenty years purchase, calculated on the rent reserved by the leases of the parts of the said lands, in the hands of the tenants. This cause now came on to be heard on the judge’s certificate of a verdict having been found for the defendant, the minor, establishing the agree-

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(1) Vide *Pemberton v. Pemberton*, 13 Ves. 290. Ex parte *Holyland*, 11 Ves. 10. *Wardens, &c., v. Morris*, 9 Ves. 155.

(2) 2 Ball & Beatty, 454.

ment for the purchase. A motion was made, on the part of the plaintiff, to set aside the verdict, and for a new trial. *The Lord Chancellor*.—"This is a motion to set aside the verdict found for the defendant, and for the court to direct a new trial; and it is insisted that the verdict has not been supported by evidence. To enable the court to disturb the verdict, it must be either contrary to the evidence, or given under the misdirection of the judge. No such objection appears to exist in the present case. In directing the issue, I thought it was a case for the jury to say, whether the terms of the contract had been fully proved; they have so decided after hearing the evidence, and unless I have been wrong in saying that part performance took the case out of the statute, I am bound by the verdict." (1)

The principles contained in these rules, and illustrated by the English authorities, as to issues out of equity, are embodied and illustrated in two recent cases in equity in this state. The first before the chancellor.

*Apthorp v. Comstock*. (2) A question arose upon the genuineness of a deed, on which the chancellor directed several issues, all going to establish the single fact. The jury having found a verdict for the complainants on each of the issues, the cause was again heard, on a motion for a new trial, and upon the equity reserved. After a brief review of the cases, the chancellor proceeds:—"It may be proper to observe, that the principles upon which this court directs a new trial of a feigned issue, are somewhat different from those which govern courts of law in granting new trials. Where this court directs an action, although accompanied by particular directions, the parties, in other respects, are left to their legal rights. The application for a new trial is, in that case, to be made to the court in which

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(1) Vide *Cleeve v. Gascoigne*, Ambler, 325, *et in notis*.

(2) 2 Paige, 482, *et vide* 1 Hopkins, 143. 8 Cowen, 386.

the action is brought, and is subject to the rules which govern the proceedings of that court in other cases. But if an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made here. In the latter case, the court will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different, if such testimony had been rejected in the one case or received in the other.—The first objection on the part of the defendants is, that the judge received evidence of the acts and declarations of persons not parties to the suit, and who were not acting as agents for the defendants.—There is sufficient testimony, however, to which no legal objection exists to satisfy me, that an intelligent jury must always come to the same result, upon the main point on which the equitable rights of these complainants rest. On that point, the conscience of the court is satisfied.”(1)

The case of *Mulock v. Mulock*,(2) came before the vice-chancellor of the first circuit. A feigned issue had been directed, to try the question of adultery, and the jury had rendered a verdict of guilty against the defendant, upon which he applied for a new trial. *The Vice-Chancellor*. —“The bill, in this case, is filed by the wife against the husband, for a divorce, dissolving the marriage contract on the ground of adultery. A feigned issue has been tried. The jury have found for the plaintiff, and the proceedings are returned to this court, with a certificate of the presiding judge, that the verdict was fully supported by the evidence,

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(1) Vide ex parte *Kensington*, Coopers' Chan. Cas. 96. *Head v. Head*, 1 Sim. & Stu. 150. *Stace v. Mabbot*, 2 Ves. sen. 552. *Collins v. Hare*, supra, p. 583.

(2) 1 Edwards, 14.



and was satisfactory to him. A motion, however, is made for a new trial. It is applied for on two grounds: 1st, Because the verdict is not warranted by the evidence; or, in other words, that there is no evidence of any adultery committed by the husband; and 2d, That the judge admitted improper testimony to go to the jury.—In the first place, it may be observed, that it is not necessary to prove directly the fact of adultery. If it were so, there are but few cases in which the charge of it could be substantiated. On looking into the case before me, I do not discover any direct evidence of the fact. Still, after a careful examination of the circumstances, as proved to the jury, and which need not be here repeated, (independent of, and entirely aside from, what is deemed by the defendant's counsel as objectionable testimony,) I cannot perceive how the jury could avoid the conclusion they came to, nor how any reasonable man can doubt the existence of the fact charged against the defendant.—But it is said improper testimony was admitted; and, therefore, the verdict should be set aside. The evidence alluded to consisted of acts of cruelty, or personal violence of the husband towards the wife. It was offered, as stated in the case, with a view to show an alienation of affection on the part of the defendant towards his wife, from the period of his first acquaintance with the object of his adulterous connexion, and to prove that the banishment of the wife from her home was the result of a plan to introduce the other into his house, the better to continue his illicit intercourse with her.—Under this view of the case, I am of opinion the judge was substantially right in the decision he made respecting the admission of such testimony. But, be that as it may, from the view which I have taken of this case, and from the well settled principles of equity in relation to the granting of new trials on feigned issues, I do not feel myself warranted in disturbing the present verdict. It is well understood, that the rules which formerly governed courts of law in granting new

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trials, upon the grounds of testimony improperly admitted or rejected, have not been adopted by the court of chancery.—The object of a feigned issue is, to satisfy the mind of the equity judge upon matters of fact; and the object is attained, when the conscience of the judge is satisfied that at the trial justice has been substantially done.” A new trial was refused.(1)

4. If the verdict on the feigned issue be decidedly unsatisfactory to the judge who tried the cause, or to the court who directed the issue, it is a matter of course to order a new trial, and *toties quoties*, although no rule of law may have been violated, nor the finding of the jury against the weight of testimony.(2)

The latter branch of the rule will be illustrated in the case of *O'Connor v. Cook*.(3) An issue had been directed on a *modus* for certain lands, and the jury found for the plaintiff in the issue, who was the defendant in equity. A motion was made for a new trial on the grounds of misdirection, and new evidence subsequently discovered. *The Lord Chancellor*.—“I am of opinion, there ought to be a new trial in this case. Beyond all question it belongs to the constitution of a court of equity to decide upon matters of fact, if they think proper. But courts of equity have for a great number of years, where questions of fact have been disputable, thought it a more proper exercise of their jurisdiction, to have them determined by a jury. At the same time, when administering the equitable relief afterwards, their own judgment ought to concur with the ver-

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(1) Vide *Williams v. Bacon*, 1 Sim. & Stu. 415. *Tastet v. Bordenave*, 1 Jacob, 516. *Bootle v. Blundell*, 19 Ves. 503. *Stace v. Mabbot*, 2 Ves. jr. 552. Supra, p. 576.

(2) 2 Tidd, 920. Gra. Prac. 416.

(3) 8 Ves. 535. Et vide 6 Ves. 665.

dict, to this extent at least, that they are not dissatisfied with the verdict. They ought to be satisfied, that the questions upon the facts have been fully and distinctly before the jury. The ground upon which I grant the new trial is not that the verdict is not satisfactory upon the facts : for I desire it to be understood that I form no conclusion upon the facts. But I am of opinion the points in this case have *not been distinctly before the jury*.—I cannot hold the language that has been held, as to sending this to the prejudices of a jury. A jury is the constitutional tribunal of the country ; and I am not at liberty to suppose they will be guided by prejudice. At law, I should have taken care not to have mixed any prejudices of my own with this question ; but I do not think I could, as a jurymen, have found the verdicts supporting some of these payments.”(1)

So, if the verdict be unsatisfactory, as in *The East India Company v. Bazett and others*.(2) This was a bill of interpleader, filed against several persons, claiming respectively to be entitled to sixty-two chests of indigo, of which the plaintiffs were holders. On a motion to dissolve the injunction, an issue was directed to try whether the defendants, *Cannon* and *Harper* were entitled to the indigo in question ; they were to be the plaintiffs, and the other defendants the defendants in the issue. The trial took place at *Guildhall*, before the lord chief justice of the king's bench, and a special jury, and a verdict was found for the defendants. A motion was made for a new trial on grounds contained in the opinion of the court. The *Lord Chancellor*.—“ Was this case so *satisfactorily* tried that the conscience of the court can be assured that it was

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(1) Vide *Carrington v. Jones*, 2 Sim. & Stu. 135. *Davis v. Moseley*, 13 Price, 423. 1 M'Clelland, 143. Et vide ultra, 13 Price, 755. 1 M'Clelland, 705.

(2) 1 Jacob, 91.

duly considered and duly decided? The jury were charged by the judge, and perhaps they might have been charged to decide in the manner in which they have decided; they then retire, whether for an hour or half an hour is not material, and then three of them return to the court, and represent that it is a case of such difficulty that they think they never shall agree.—Looking at their going out of court, under these circumstances, not having then agreed, and at their not having agreed up to the time of their sending the second message to the plaintiff's solicitor, I cannot consider that the question which they could not decide in two hours, could be properly settled in so short an interval as elapsed between that message and their delivering the verdict. I do not think that is the way in which issues from this court should be tried. I beg it to be understood, that I do not impute any thing to the jury. They probably thought it was the best verdict; but there was not a period sufficient for consideration between the existence of the difficulty and its removal." And for this cause a new trial was granted.(1)

So, where it appeared the verdict had been obtained by surprise and against the opinion of the learned judge who tried it, being also contrary to the opinion of the equity judge, a new trial was granted.

An issue was directed in *Willis v. Farrer*,<sup>(2)</sup> tried before Mr. Justice Bayley and a special jury, who rendered a verdict for the plaintiff. *Brougham*, for the defendant, obtained a rule to show cause why a new trial should not be granted on the grounds that the verdict was contrary to the evidence, and given through mistake and surprise, and against the opinion of the learned judge, who, on the trial, had gone through the evidence of the

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(1) *Faulconberg v. Pierce*, Ambler, 210. *Sewell v. Freeston*, 1. Chan Cas. 65. (2) 3 Younge & Jervis, 264. *Supra*, p. 356.

plaintiff, and some part of the evidence of the defendant, and was making an observation in favour of the defendant, when the jury interrupted him, saying, they were quite satisfied: and the judge thereupon stopped, and the jury found immediately a verdict for the plaintiff. The *Lord Chief Baron*, after a review of the testimony and the opinion of the judge, followed with an expression of his dissatisfaction with the verdict, concludes:—"I think the learned judge was warranted in directing the jury to consider whether hay might not, in the early terriers, mean all the produce of grass land. In the interpretation of ancient instruments, usage has frequently supported a new mode of construction. In this case that construction is sustained, not only by the usage of payment, but by many other instruments putting that construction upon them, and by a great body of parol testimony, the reputation in the parish, and the declarations of deceased parishioners. I do not feel that the expressions in the documents are so full, clear, and unequivocal as to authorize me to presume the endowment necessary to support the vicar's claim, in opposition to undisputed usage; to the strong probability of the title being in substance rendered elsewhere; to the claim of the parish for many years; to the formal admission of that claim by two of the vicars; and to the acquiescence of all, till the present suit. I think the verdict must be set aside, being *against the opinion* of the learned judge: and that it must be tried again."<sup>(1)</sup>

So, in *Fanleas v. Fanleas*,<sup>(2)</sup> A new trial awarded on a feigned issue, to try the validity of a will, on the dissatisfaction of one of the judges who tried it. The verdict was for the plaintiff, thereby establishing the will. The defendant's counsel moved the court to grant a new trial,

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(1) Vide *Morris v. Davies*, 3 Russell, 315. *Atkins v. Drake*, 1 McClelland & Young, 380.

(2) 4 Yeates, 2.

on the ground that the defendant was sick, and unable to attend, having material testimony to produce; that the trial was urged on by the plaintiff by surprise, and that the verdict and judgment thereon would be final and conclusive. The charge of the chief justice was in favour of the writing as a will; but *Smith, J.*, added, that on the most mature reflection, he was not satisfied with the decision of the jury, and thought the case required another hearing. The counsel submitted the case to the court, *Per Curiam*.—"We wish not, by our remarks, to prejudice the plaintiff's cause. Let there be a new trial; it will give more general satisfaction."

As the power to grant new trials originates with the jurisdiction of courts of equity, they exercise it in all cases, indiscriminately, at common law. In this state, however, there is one class of cases that have been provided for specially, as to the exercise of equity powers in granting new trials in feigned issues. Our statute having introduced a particular kind of equity jurisdiction, granting divorces *a vinculo matrimonii*, on the ground of adultery, has directed a feigned issue, and added that the court "may award a new or further trial of such issue as often as justice shall seem to require."<sup>(1)</sup>

Thus, in *Germond v. Germond*,<sup>(2)</sup> where the testimony was not warranted by the issue. The complainant had charged the defendant with having committed adultery with one *W. C. F.*, in Rensselaer county, and in New-York with persons unknown; and on the trial had proved the defendant had committed adultery in that county, not with *W. C. F.*, but with another. The jury found the adultery as charged. The finding being out of both the issue and the testimony, upon an application for a new trial, the chancellor having reviewed the pleadings, and

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(1) 2 R. S. 145. § 40.

(2) 6 Johns. C. R. 347.

the English authorities bearing an analogy to the principal case, concludes: "I have gone into this examination of analogous cases, to show that probably the better opinion is, that a charge of adultery need not specify the names of the persons with whom it was committed; and certainly it cannot and need not be required, if the persons are unknown when the bill is filed. But, in this case, as the feigned issue specified a particular individual in the county of R., and had no general charge as to that county, I conclude that the plaintiff should be confined to that specific charge. I shall accordingly set aside the verdict, on account of the admission of evidence not warranted by the issue as it stood, and shall award a new trial, and allow the plaintiff to amend the feigned issue as he shall be advised."<sup>(1)</sup>

5. When the feigned issue is directed out of chancery, the application for a new trial must be made to that court. It is intended to inform and to satisfy the court, and of this no other court can be the judge.<sup>(2)</sup>

*Bowker v. Nixon.*<sup>(3)</sup> This was an issue directed by the court of chancery, which was tried before *Heath, J. Shepherd*, Solicitor General, now moved for a new trial, upon the ground that certain evidence had been improperly rejected. He was aware that the general rule, with respect to issues out of chancery, required that the motion for a new trial should be first made in that court; but he conceived, that where the point related to the propriety of the decision of the judge who presided at the trial, as to the admission or rejection of evidence, it formed an exception to the rule, and that the motion, in such case, ought to be

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(1) Et vide 2 Mad. Chan. 381. *Fowkes v. Chadd*, 2 Dick. 576. *Bates v. Graves*, 2 Ves. jr. 287. *Codd v. Codd*, 2 Johns. C. R. 224.

(2) Vide 1 Newl. Chan. Prac. 353.

(3) 6 Taunt. 444.

first made in the court of law. The court held, that in questions of evidence, as well as all other cases, the distinction made in this respect, between issues out of courts of equity and other actions, was to be observed, and that this application must first be made to the court of chancery. And rule refused.

So, in *Stone v. Marsh*,<sup>(1)</sup> where, on an issue directed to be tried at law by the lord chancellor, points at law were reserved for consideration, it was held, the motion for a new trial, with a view to have the points discussed, must be made in chancery, and not in this court.

The same practice prevails in this state; as in *Doe v. Roe*.<sup>(2)</sup> Feigned issue, ordered by the chancellor, to try the question of adultery. A verdict having been found for the defendant, a case had been made for a new trial in this court. A motion was made to strike the case from the calendar, upon the ground that the application should have been made to the court of chancery. *Per Curiam*.—"Applications for a new trial, upon these feigned issues, have in several instances been made to this court, without objection; as appears from the cases cited by the plaintiff's counsel; and one of those applications was upon a feigned issue, to try the fact of adultery; but they are also entertained in the court of chancery; and the statute seems to contemplate the latter court as the proper tribunal for this purpose. Without saying, therefore, whether we have power to hear and determine the motion for a new trial in this cause, we order it to be stricken from the calendar, on the ground that this is a matter more properly cognizable in the court of chancery."

And in *Doe v. Roe*.<sup>(3)</sup> This was a case made on trial of a feigned issue of *devisavit vel non*, directed by the

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(1) 8 Dow. & Ryl. 71.

(2) 1 Cowen, 216.

(3) 6 Cowen, 55.



judge if the suit should stand in equity. The judge of that court tried the case as law. The cause being on the calendar of the present term for argument upon the case, *Plaintiff* moved on the authority of *Doe v. Roe*,<sup>(1)</sup> to strike it off. *Speaker* said that case was distinguishable from this not only as being an issue on a bill filed for a divorce, but also as arising under the old organization of the judiciary, when the judge who held the circuit had no chancery powers. Here, the very judge who orders the issue, tries the cause at the circuit, and reviews it in a motion for a new trial. *Curia*.—"We do not mean to say, that we have not power to hear the case; but we think the more proper course is to move in the court of equity." Motion granted.

Our statutes have not divested the courts of law of any jurisdiction they may have possessed at common law, on the subject of feigned issues. But those legislative provisions which refer expressly to feigned issues, in causes originating in courts of equity, or to be reviewed by them on appeal, point to these courts as the legitimate source of relief from the oppression of unjust verdicts, on issues directed by themselves. Between the decisions of our supreme court, just cited, and our revised statutes, subsequently adopted, there appears to exist a perfect accordance on this subject.<sup>(2)</sup>

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(1) 1 Cowen, 216.

(2) Vide 2 R. S. 66. 145. 175. 609.

## CONCLUSION.

As a conclusion to this work, it may be proper to take a brief notice of the **TERMS** on which verdicts are set aside, and new trials granted. Here, the discretion of the court is unlimited; the governing principle being, to do strict justice between the contending parties. Some cases are so strongly marked, as to furnish precedents from which rules have been extracted of easy application; while others have required the close attention of the court to the merits, and to the probable consequences of granting the motion, affecting the justice of the case.

The terms are distinguishable into two kinds; one, where *costs* only are imposed, the other, where the courts superadd to the payment of costs other *conditions*, with reference to the pleadings or the merits, or the probable result. In imposing costs only, the courts confine their views to the antecedent proceedings; but in superadding other terms they look at the consequences, and provide against injustice or undue advantage, in the event of depriving the prevailing party of the verdict.

Among the more prominent and well defined rules, imposing terms as to costs, is one whose application is of daily occurrence, that wherever a party seeks to be relieved from the consequences of his own irregularity, or his adversary asks to set aside proceedings for that cause, he must pay costs.(1)

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(1) 2 Tidd, 921. 2 Arch. Prac. 228. Gra. Prac. 516.

Another rule, equally well defined, and applicable to new trials, is, that the party asking a favor, and excusing himself, when his adversary is in no default, must pay costs.<sup>(1)</sup> For instance, if he ask to have the verdict set aside upon the ground of the cause having been called on in the absence of counsel. As in *Fourdrinier v. Bradbury*,<sup>(2)</sup> where the court directed a new trial, *only* on payment of costs. Or where there has been surprise, as in *Thartell v. Beaumont*;<sup>(3)</sup> or asks to set aside a nonsuit, occasioned by the accidental absence of a witness, as in *Skillito v. Theed*.<sup>(4)</sup>

It is no less clearly settled, that where a verdict has been had *mala fide*, the court will not only set it aside as of course, but will, in gross instances, impose costs on the party who has resorted to the fraud. As in *Anderson v. George*,<sup>(5)</sup> where the court not only set aside the verdict, but set it aside without payment of costs; and declared the next time that a party should obtain a verdict in like manner by an unfair, *unconscionable* advantage, without trying the real question, they would set aside the verdict, and make *him pay the costs*.

So, in the case in *Buller*,<sup>(6)</sup> where the plaintiff had concealed, in his house, a material witness for the defendant, so as to avoid the being served with a subpoena, and had a verdict, which the court set aside, without costs.<sup>(7)</sup>

And, to mark their detestation of procuring verdicts by unfair practice, the courts have, in some instances, direct-

(1) Vide last cited authorities *in loco*.

(2) 3 Barn. & Ald. 328. Supra, 174.

(3) 1 Bingham, 339. Supra, p. 170. 225.

(4) 6 Bingham, 753, and vide cases cited as illustrative of Absence, Surprise, and Mistake of Parties, ante Chap. VI.; and of Witnesses, Chap. VII. *passim*.

(5) 1 Burr. 352. Supra, p. 56.

(6) Bull. N. P. 328.

(7) Et vide Hull. on Costs, 391.

ed the attorney of the party, who has misbehaved in procuring the verdict, to pay the costs out of his own pocket. As in *Trubody v. Brain*,<sup>(1)</sup> where the plaintiff's attorney contradicted the testimony given by one of the defendant's witnesses, who had sworn that he never had had any conversation with the former on the subject in question, by stating positively that he had, and what the conversation was. The defendant's witness was in consequence committed for perjury, but was afterwards discharged, on the attorney stating the next day, that he might have been mistaken in the person of the witness for that of his brother, who greatly resembled him. An application being made for a new trial under these circumstances, and that the plaintiff or his attorney should be ordered to pay the costs of the former trial, the court granted a rule accordingly, which was afterwards made absolute; the court ordering the plaintiff's attorney to pay the costs of the former trial.

There is another case where the party must pay costs to entitle him to relief; when on the motion he puts forward some new ground not taken at the trial. As in *Sutton v. Mitchell*,<sup>(2)</sup> where the defendant moved to set aside the verdict on one part of a section of a statute, but had relied on a different part at the trial. The motion was granted, but with costs, with this *nota* appended: "The rule was made absolute on payment of costs, because this motion was made on a new ground, not opened before on the trial."

In these cases, costs are allowed as a matter of strict right, and cannot, therefore, be said to be in the discretion of the court. They are the mulct the law exacts for irregularity, or, what is equivalent to it, negligence or circumvention. Besides, the party who has the verdict has obtained it in the course of a correct practice; and justice requires that he should not be placed in a worse situation,

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(1) 9 Price, 76. *Supra*, p. 58.

(2) 1 Term Rep. 18.

or subjected in any event to costs, by conferring a favour on his less vigilant or upright adversary.

But there are other cases requiring review, where the parties are equally blameless, and where costs do not follow of strict right, upon setting the verdict aside. Here the courts exercise their discretion, and generally grant the motion without costs, or direct the costs to abide the event, upon the ground that the necessity for a second trial has grown out of occurrences which the parties could not control, and where some blame is to be attached to others. Of this description are new trials for the misdirection of the judge, his admission of illegal, and his rejection of legal testimony, and his directing a nonsuit, contrary to law.(1)

As in *Buscall v. Hogg*,(2) where the plaintiff was improperly nonsuited, but with leave to move to set aside the nonsuit without costs, which was granted on motion. So in *Vale v. Bayle*,(3) where upon a question of delivery of goods to a carrier, there was *prima facie* proof. The judge, notwithstanding, nonsuited the plaintiff, and the court set it aside without costs. And in *Williams v. Smith*,(4) the rule is recognised thus:—"In another cause, between the same parties, the court said, the granting new trials was always on payment of costs, unless otherwise expressed, or when for the misdirection of a judge; in which latter case, they abide the event of the suit."(5)

And the same rule will apply to setting aside a nonsuit, to which the plaintiff has submitted, in compliance with the erroneous direction of the judge, as well as where he is nonsuited against his will. As in *Pochin v. Pawley*,(6) Assumpsit against a surveyor of a turnpike road. The

(1) Tidd, 921. Gra. Prac. 516. Say. Costs, 189. 6 Cowen, 590.

(2) 3 Wils. 146. (3) 1 Cowp. 297. (4) 2 Caines, 253.

(5) Vide *Birkett v. Willan*, 1 Chitty's Rep. 633. *et in notis. Sherlock v. Barned*, 8 Bingham, 21. (6) 1 W. Blacks. 670.

judge thought there was no evidence of a contract with him, but with the commissioners who employed the defendant; and he would have nonsuited the plaintiff, but he refused, and had a verdict. On motion to set it aside, the court were unanimously of opinion with the judge who tried the case, and as the plaintiff had refused to be nonsuited, contrary to the opinion of the judge, they granted the new trial without costs. It is added, "In like manner, as, where a plaintiff submits to a nonsuit, in compliance with the erroneous opinion of a judge, the nonsuit shall be set aside without costs."<sup>(1)</sup>

Upon the same principle, the court will set aside the verdict, and grant a new trial *without costs*, where the jury have misbehaved themselves.<sup>(2)</sup> Thus, where the jury drew lots, although they happened to find according to the evidence and the opinion of the judge; *Hall v. Cove*.<sup>(3)</sup> Upon motion for a new trial, it was agreed, that the verdict must be set aside; but the question was, whether the defendant should pay costs. The court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of the new trial.<sup>(4)</sup>

So, where the jury render a *perverse* verdict; but not where they honestly commit an error. This distinction is taken in a recent case, *Shillitoe v. Claridge*.<sup>(5)</sup> Upon a motion for a new trial, on the ground of a verdict clearly against evidence, in this case, Lord *Ellenborough* said, that it was the rule, that where the verdict has been the error of the jury, the new trial is always with costs; but where

(1) Sed vide 1 Anst. 47.

(2) 2 Arch. Prac. 228. Gra. Prac. 516. Hull. Costs, 383.

(3) 1 Str. 642. Et vide Willes, 488.

(4) As to Misbehaviour of Jury, and terms of relief, vide ante Chap. IV. *passim*.

(5) 2 Chitty's Rep. 425.

there is any misconduct in the jury, Lord *Kenyon* had made an exception, and the court had often done so since.

So, in *Scott v. Watkinson*,<sup>(1)</sup> Action for the price of a stack of hay, £18. The jury, after a strong intimation from the learned baron, that the plaintiff was entitled to recover, found a verdict for the defendant. The plaintiff moved to set aside the verdict, as against evidence and the express opinion of the judge, and therefore perverse, and out of the rule governing cases under £20. The court said, that they would communicate with Mr. Baron *Vaughan* on the subject; and Mr. Justice Park said, that he had seen him, and that he said, that although he should have been better satisfied if the verdict had been the other way, yet that he did not consider it so perverse as to induce the court to grant a new trial without payment of costs.<sup>(2)</sup>

And it appears to be well settled, that upon a case reserved, and judgment on the merits, as well as on a case reserved, but imperfect, the costs will follow the event.<sup>(3)</sup>

In *Hodgson v. Barvis*,<sup>(4)</sup> where the jury rendered a perverse verdict,<sup>(5)</sup> and it was insisted that the new trial should be without costs. Lord *Ellenborough* said, that where there was any perverseness in the finding of the jury, the rule for a new trial had been made absolute, without costs; and he added, that when at the bar, he had often obtained such rules, on that ground, without costs. Eventually, he said that the costs should abide the event.<sup>(6)</sup>

(1) 4 Moore & Payne, 237.

(2) Vide *Freeman v. Price*, 1 Younge & Jervis, 402.

(3) Vide 1 Str. 300. 3 Term Rep. 507. 6 Term Rep. 71, 144.

(4) 2 Chitty's Rep. 268.

(5) As to Perverse Verdicts, and relief from, vide *supra*, 121.

(6) Et vide *Jackson v. Duchaire*, 3 Term Rep. 551. *Jackson v. Lomas*, 4 Term Rep. 166. *Feise v. Randall*, 6 Term Rep. 146.

But the rule does not apply to new trials granted on the ground that the verdict is contrary to evidence, or that the damages are excessive.(1) This being a verdict produced in the exercise of an honest, but mistaken judgment, and no rule of law violated, the courts have thought proper that the party asking to disturb it should pay costs, not as a mulct, but as the price of relief from misfortune, where no blame to any one can, with propriety, be attached. The application is for a new trial, strictly on the merits.

In an *Anonymous case*,(2) the court take this distinction : " If a new trial be granted for irregularity, there shall be no costs paid for it ; but if defence be made, it may help the irregularity. If new trial be upon the merits of the cause, there must be costs."(3)

In the leading case, *Bright v. Eynon*,(4) there was a verdict against evidence ; and motion for a new trial granted on payment of costs by the plaintiff, after motion of the plaintiff's counsel that it should be without costs. And in *Burton v. Thompson*,(5) and *Macrow v. Hull*,(6) it was assumed that the plaintiff, in both instances, would have to pay costs ; and upon this assumption, although the verdicts were clearly against evidence, yet the cases being of a frivolous character, a new trial in neither case was worth the paying for, and they were for that reason in both instances refused.

But payment of costs is not the only, or indeed the principal condition on which new trials are directed. There are other circumstances, much more deeply affecting the rights of the parties, and, in protecting these against the unequal consequences of disturbing the verdict, various circumstances present themselves calling for the imposition of such terms to accompany the rule, as may

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(1) 2 Tidd, 921. Gra. Prac. 516.

(3) Et vide Hull. Costs, 383. 387.

(5) 2 Burr. 664.

(2) 12 Mod. 370.

(4) 1 Burr. 390.

(6) 1 Burr. 11.



furnish the best security of even-handed justice to both parties, in any event. For this purpose, there is an uncircumscribed latitude of power, to be guided by judicial discretion, inherent in courts of justice.

The terms imposed on setting aside verdicts, in addition to costs, may be divided into *ordinary* and *extraordinary*. To the former belongs the rule with which every practitioner is familiar, that of pleading or replying *instantly*, taking short notice of trial, and in a word, placing the regular party in no worse situation than he would have been, if that which has caused the application for relief had never happened.

The *extraordinary* terms arise out of the merits of the case, the relative situation of the parties, the probable consequences of delay, the advantage or disadvantage that may result to either party from the state of the pleadings, the prejudice that may result to the prevailing party from opening the whole case, and again putting the entire merits afloat, the propriety of protecting the party from being harassed with double applications on cases and bills of exceptions, and, in short, the necessity of preserving and securing good faith, and the best chance for impartial justice upon the final disposition of the case. All these considerations press upon the mind of the court, and call for salutary conditions to accompany the relief granted. To accomplish, at the same time, the claims of justice, by sending the case to another jury, and protect the rights of the party in possession of the verdict, the courts will direct the requisite stipulations to be inserted in the rule; and, for this purpose, the court will look into the case.<sup>(1)</sup> Thus,

The verdict will be allowed to stand, or the money directed to be paid into court as security, when the court is satisfied that the rights of the party who has obtained the

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(1) *Keate v. Temple*, 1 Bos. & Pul. 158.

verdict would probably be prejudiced by delay, if the verdict were set aside. This is a condition of frequent occurrence, and evidently just.(1) And, it seems, where a special case has been reserved, a new trial has been granted, without previously setting aside the former verdict.(2)

If the putting of the whole case afloat upon the law and facts would produce an unequal hazard to the prevailing party, the court will limit the new trial to a single point. As in *Thwaites v. Sainsbury*.(3) Assumpsit, and the defence was, that the plaintiff had taken bills of exchange on his own risk in full, and released the defendant from all responsibility. There was a verdict for the plaintiff; and, on motion for a new trial, as contrary to evidence, the court intimated a wish to limit the inquiry to the single question, whether the plaintiff had agreed to take the bills on his own risk, expressly releasing the defendant from any responsibility. *Spankie*, sergeant, objected, that the court, in the exercise of its discretion, as to granting a new trial, had seldom or never restricted a party in this way to a single point of inquiry; and he prayed to be allowed as usual, to go to trial again generally, without restriction. But the court observing, that in causes where the defence was set out in pleading, the parties would, on a second trial, be necessarily confined to the issues which were on the record at the first trial; and that it was expedient the same course should be pursued where a particular line of defence had been relied on under the general issue, imposed that condition on the defendant, and made his rule for a new trial absolute, on the following terms:—Payment of costs; bringing into court the money sought to be recovered; and limiting the inquiry on the new trial to the single point, whether the plaintiff had agreed to take the bills on

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(1) 2 Tidd, 922. Gra. Prac. 516, et vide 8 Taunt. 712.

(2) Lofft, 451.

(3) 7 Bingham, 437.

in two cases, depending upon the declaration from any responsibility.

In addition to the ordinary practice, that witnesses may be examined *de novo*, the court may impose the further term, that evidence taken in the former trial may be read on the second trial: as in *Stallan v. Clavidge* (1). The court having granted a rule to set aside the verdict, on payment of costs. *R. J.* moved, that as one of the witnesses was very old and ill at the time of the trial, it should be made a part of the rule, that the chief baron's note of his evidence should be read on the new trial. Lord *Ellenborough* Ch. J. said that that might be made part of the rule.

If the applicant for a new trial would acquire any undue advantage by the state of the pleadings, on setting aside the verdict, the court will protect the party who has the verdict by imposing as terms, that the new trial is to take place on the merits, without regard to the form of the action. (2)

Or, if an amendment should become necessary, they will allow the opposite party the same right to plead, or reply, or demur, as he had before he put in his plea or replication, as in *Williams v. Pratt*. (3) The plaintiff was nonsuited, on the account of a variance. On application to set aside the nonsuit, the court granted the plaintiff a rule nisi, for a new trial, with leave to amend the declaration, on payment of costs. The rule was made absolute, the court saying, "The plaintiff should be at liberty to amend his declaration generally, and the defendant may then either plead *de novo*, or demur to the declaration, according as he may be advised." (4)

Or, if the case stands so upon the pleadings, that if the

(1) Chitty's Rep. 425.

(2) *Welsh v. Dugar*, 3 Binn. 329. (3) 5 Barn. & Ald. 896.

(4) *Hoar v. Mill*, 4 Maule & Selw. 470. *Halhead v. Abrahams*, 3 Taunt. 81.

defendant has a new trial he may nonsuit the plaintiff ; and, on the other hand, if the plaintiff is allowed to amend his declaration to meet his proof, the defendant will lose the benefit of his offset, the court may refuse the motion, as, upon the whole, the best adopted to do equal justice ; as in *Gerbier v. Emery*,<sup>(1)</sup> where the court say, the new trial could only be for the purpose of nonsuiting the plaintiff ; and if the plaintiff were allowed to amend, the new trial could be of no use to the defendant, and therefore discharged the rule.

Or, if necessary to the justice of the case, the court will impose, as a condition, that the party consent that the form of action be changed, as in *Walker v. Long*,<sup>(2)</sup> where the court held this language—"In granting a new trial, the application is made to the discretion of the court ; and it is in the power of the court to lay the party applying under equitable terms. This power should always be used to prevent the plaintiff, if possible, from being turned round, which can only occasion delay and additional expense. In this case, the court grant a new trial, on condition that the defendant consent that the form of action be changed to an action of account render, and that the costs of the former action abide the final event of the cause. The court are aware, that they have gone further than they are warranted by any precedent ; but they think not further than they are justifiable in their discretion upon the subject of a new trial."

If parties claiming in right of others, who are irresponsible, apply for a new trial, the court will impose upon them, as a condition, that they consent to be bound by the verdict, and to be responsible for the costs, as in *Noble v. Adams*.<sup>(3)</sup> The assignees of the plaintiff, a bankrupt, claim-

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(1) 2 Wash. C. C. Rep. 413.

(2) 2 Browne's Rep. 125.

(3) 7 Taunt. 59.

ed the benefit of a recovery, and on a verdict for defendant, applied to set it aside. *The Court* observe—"It is fit to impose the terms, that the assignees of the plaintiff, who is now a bankrupt, shall consent to be bound by the event of this action, and to be responsible for the costs." The assignees of the plaintiff signified their refusal to accept the permission offered them. And, *Per Curiam*.—"The plaintiff is a bankrupt; he will be unable to pay any costs himself. The defendant has obtained a verdict. The plaintiff, or rather his assignees through him, apply for a new trial. They profess, that if the plaintiff gets a verdict against the defendant, they will take the benefit of it; if *Noble* fails, they refuse to be bound by the verdict or pay the costs, upon the ground that this is *res inter alios acta*. Upon that ground, that it is *res inter alios acta*, we leave them to that right of action which remains to them, and this rule must be discharged.

But it will be different, if the plaintiff sue in his own right and be insolvent. They will not exact terms of payment or security from him, with which he is unable to comply, for that would amount to a denial of justice.(1)

When the applicant for a new trial has tendered a bill of exceptions, the court will compel him to elect or refuse a new trial, unless he abandon his writ of error. So ruled in *Doe v. Roberts*,(2) where it was held that when a bill of exceptions has been tendered, the court will not grant a motion for a new trial, unless the bill of exceptions has been abandoned. And in *Corlies v. Cummings*,(3) where the plaintiff took a bill of exceptions on certain points of law; and afterwards made a case embra-

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(1) Vide *Goode v. Sir W. Lewis*, 4 Price, 307. *Hallet v. Cotton*, 1 Caines, 11. *Bird v. Pierpoint*, 3 Caines, 106.

(2) 2 Chitty's Rep. 272, et vide 2 W. Black. 929.

(3) 5 Cowen, 415.

cing the same points ; and also bringing up the question as to the weight of evidence. It was moved that the defendant should elect which he would abide by ; and that if he should elect the one, the other should be set aside. *Curia*—"The defendant cannot pursue the bill and case both. He must elect."(1)

If either party have died since the period, that by the rules of the court the prevailing party would be entitled to judgment ; or if there is a strong probability from appearances, that the party making the motion may die before verdict on the new trial, the court will impose, as a condition of granting it, that the party stipulate against the consequences of such an event.

The power of the court, and disposition to exercise it, when a proper case occurs, is to be inferred from *Lopez v. De Tastet*.(2) On motion for a new trial, the court had imposed, as a condition, the defendant should secure payment, in the event of a verdict for the plaintiff. Afterwards the plaintiff moved to amend the rule on affidavit of delay, and that the defendant was eighty-seven years of age, and infirm, that it might be provided by the rule, that the suit should not abate in the event of the death of the defendant, and relied on *Pleydell v. The Earl of Dorchester*.(3) *Dallas*, Ch. J.—"That case turned on different circumstances, nor was there any guarantee. Here the party might have stipulated for the non-abatement of the suit at first, and then Glyn & Co. would have considered whether they would have entered into the bond or not on those terms ; but the application is now made out of time, and cannot be granted."

So, in *Griffith v. Williams*.(4) Where in an action for breach of promise of marriage, the court of exchequer said,

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(1) Vide 1 Johns. Rep. 192. (2) 8 Taunt. 712. 7 Moore, 129.

(3) 7 Term Rep. 525. (4) 1 Crompt. & Jervis, 47.

that, although the plaintiff had died, they should have no difficulty in imposing such terms as would enable the parties to go to another trial if necessary. And *Garrow*, B., mentioned a case in which he had been of counsel, where the court of king's bench had imposed similar terms in granting a new trial on the application of the defendant, who, it was suggested, was likely to die before the cause could be tried a second time. And in *Palmer v. Cohen*,<sup>(1)</sup> Lord *Tenterden*, Ch. J., observes—"It might be done in an action of this kind, as well as in a mere action of debt."

Other instances may well be conceived, in which the exercise of this salutary power might become necessary for the furtherance of justice. It may be safely asserted, that no case can occur, presenting circumstances timely addressed to the discretion of the court, in which the rights of the parties may not be fully protected, by the imposition of conditions meeting the exigency.

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(1) 2 Barn. & Adol. 966.

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